Central Law Journal.

ST. LOUIS, MO., FEBRUARY 2, 1900.

The decision just rendered by the Supreme Court of the United States, in the case of The State of Louisiana v. The State of Texas, is one of a number going to illustrate the reluctance of the court of last resort to interfere with the exercise of the police power of the States. The case involved the right of the State of Texas to institute such a rigorous quarantine as was put in force during the prevalence of yellow fever in New Orleans. It was alleged by the State of Louisiana that the Texas quarantine was so strict as to place an embargo on all interstate commerce between the city of New Orleans and the State of Texas and to benefit the commerce of Galveston and other Texas cities at the expense of New Orleans, and was in violation of the constitution of the United States. The State of Texas demurred on the ground that the Supreme Court of the United States had no jurisdiction in the case. This view was sustained by the supreme court, which held that it was not within the judicial function to inquire into the motives of a State legislature in passing a law or of a chief magistrate in enforcing it in the exercise of his discretion and judgment, and that the case could not be regarded as presenting a controversy between the States.

The *New York Law Journal* calls attention to a recent decision of the United States District Court of New York, In the Matter of Howard Emslie & Son, wherein it is held that mechanics' liens for labor and materials, filed under the New York statute are void and dissolved under section 67f of the Bankruptcy Act by a petition in bankruptcy filed within four months after their filing. There will be general concurrence in the statement by the exchange mentioned that "the important significance of such decision need not be emphasized and it seems a practical misfortune that the court felt constrained to come to such a conclusion." Public policy favors the protection and substantial enforcement of liens of this character. In the Bankruptcy Act of 1867 they were expressly exempted from its operation and upheld. In the decision in *Re* Kirby-Dennis Co., in the United States Circuit Court of Appeals, Seventh Circuit, 95 Fed. Rep. 116, cited in the present decision, the following language is used: "It is also urged that since the Bankruptcy Act does not, as did a former Bankruptcy Act, expressly reserve liens of this character, therefore they are not entitled to protection. It is possible, perhaps, for congress to interfere with vested rights, and to impair obligations of contracts; but such legislation would be opposed to equity and good conscience; and the intention of congress so to enact cannot be presumed, in the absence of clear and unmistakable expression. We find in the Bankruptcy Act no such design."

The present Bankruptcy Act provides (sec. 67a) that "claims which for want of record, or for other reasons, would not have been valid liens, as against the claims of creditors of the bankrupt, shall not be liens against his estate." Citing this provision and relying upon its implication, the district judge, whose decision (94 Fed. Rep. 818), was affirmed in *Re* Kirby-Dennis Co. by the Circuit Court of Appeals, *supra*, remarked: "There being no provision to the contrary, I am of opinion that the liens afforded by the State statute are undisturbed by the present act, and that decisions as to their force under the act of 1867 are, generally speaking, applicable as well under the present act." The actual decision in *Re* Kirby-Dennis Co. was to exempt from avoidance mechanics' liens which had been filed under the statute of Michigan, and uphold them in preference to, and to the exclusion of, claims for work and labor of the same character, as to which liens had not been filed.

The reason for the present distinction against New York mechanics' liens is found in a difference of phraseology in the Michigan and New York statutes, respectively. As is shown in the opinion, the Michigan statute by its terms *ipso facto* creates the lien, while, for the creation of the lien in New York, the filing of a notice is necessary. From this difference is deduced the conclusion that in New York a mechanic's lien falls under Section 67f, providing that "all levies, judgments, attachments or other liens obtained through legal proceedings," at any time within four months prior to the filing of a

petition in bankruptcy, shall be deemed null and void. "With all due respect," says the *New York Law Journal*, "we think it may be urged with very considerable force that the filing of a mechanic's lien is not a legal proceeding. Under the maxim of construction, *noscitur a sociis*, it, indeed, appears quite difficult to believe that congress intended to comprehend mechanics' liens under the phrase 'legal proceedings' in Section 67f. There is certain language in the opinion of the circuit court of appeals in *Re* Kirby-Dennis Co., *supra*, which tends to countenance the contention that a lien arising only upon the filing of a notice is one acquired through legal proceedings. Such language, however, was not necessary to the decision, and it is doubtful if it would have been used if the present point had been directly before the court. We do not think that by the language in question the circuit court of appeals intended anything but emphasis—that it could not be claimed on any theory that, under the Michigan statute, 'legal proceedings' were necessary for the creation of a mechanic's lien. Nor do we think that the cited decision of Judge Woodruff in *Re* James R. Dey, 9 Blatchford, 285, necessarily tends to support the present decision. It is true that it is therein recognized that a mechanic's lien may arise under appropriate phraseology by virtue of a statute itself. But we find nothing therein that aids the view that where a statute provides for a lien upon the filing of a notice, such filing shall be considered a legal proceeding.

"Considering the general policy of the law in all States toward effectuating mechanics' liens, we think the Bankruptcy Act should be construed liberally in their favor, and that uniformity of attitude should be as far as possible assumed toward them, despite the variations in form of State statutes. In such spirit it would seem not illegitimate to regard the filing of the lien in a public office as merely an incident of the statute, and to hold that the statute itself takes effect through such formality, and that in reality the lien is created by the statute. If the present decision as to New York mechanics' liens be sustained on appeal, the matter should be brought to the attention of congress with a view to an amendment following the provision in the Act of 1867."

NOTES OF IMPORTANT DECISIONS.

BILLS AND NOTES—ASSIGNMENT BY MAKER—PARTIAL PAYMENT BY INDORSER.—Following the rule suggested by the United States bankruptcy cases in preference to the English rule on the subject, the Supreme Court of Massachusetts, in Beals v. Mayher, 54 N. E. Rep. 857, has decided (1) that where the maker of a note has made an assignment for the benefit of creditors, and the indorser has made a partial payment to the holder, the latter is entitled to prove the full amount of the note before the assignee of the maker, without deducting the amount received by him from the indorser; from which it follows (2) that the indorser cannot compete with the holder before the assignee for the amount paid by him, since to allow him to do so would be to allow a double proof of the same debt.

CONTRACTS — FUTURES — BROKERS—GAMING CONTRACTS.—In Johnston v. Miller, 53 S. W. Rep. 1052, decided by the Supreme Court of Arkansas, it appeared that plaintiff was a cotton broker, and a member of the New York Cotton Exchange, a corporation created under the laws of New York, and authorized to deal in cotton both for present and future delivery. The rules of the exchange recognize no contract, except for selling and purchasing cotton to be actually delivered. Defendant, a citizen of Arkansas, wired plaintiff to purchase for him 500 bales of cotton for future delivery in December, depositing $500 in bank to his credit for that purpose. In the correspondence with defendant, plaintiff stated "that he would make some money out of the transaction." Plaintiff testified that he purchased the cotton for the defendant, as requested, under and pursuant to the rules of said New York Cotton Exchange, contemplating actual delivery. Plaintiff knew defendant to be financially unable to pay for the cotton at the time the contract should close. The market declined, and plaintiff was compelled to advance money for margins on defendant's account, to recover which he brings suit. It was held that the contract was not one dealing in futures, and therefore not a gambling contract, under Sand. & H. Dig. § 1634 *et seq.*, which declares "the buying or selling or otherwise dealing in what is known as futures, * * * with a view to profit," to be gambling, and a misdemeanor subject to punishment.

MUNICIPAL CORPORATION—SEWERS—NEGLIGENCE—LIABILITY FOR OVERFLOW.—In Judd v. City of Hartford, 44 Atl. Rep. 510, decided by the Supreme Court of Errors of Connecticut, it was held that a municipality is liable for damages sustained by the flooding of a basement during a severe but not extraordinary rainfall, caused by an obstruction left in a sewer by the city's workmen, which was placed there for a temporary purpose while they were altering the sewer, and which they negligently omitted to remove when

the alterations were completed. The court said: "The city was held liable to the plaintiffs, not because it planned and constructed an inadequate sewer, but because, after planning and constructing an adequate sewer, it left obstructions in it, placed there for temporary purposes, which its agents carelessly omitted to remove after those purposes had been accomplished. For negligence in such matters a municipal corporation cannot escape responsibility on account of its public character. It is a person in law, capable of inflicting injuries, and liable to suit by him who suffers them, unless they flow from, or are incident to, the performance of a governmental duty. Municipal duties are governmental when they are imposed by the State for the benefit of the general public. They may sometimes have that character, also, when imposed in pursuance of a general policy, manifested by legislation affecting similar corporations, for the particular advantage of the inhabitants of the municipality, and only through this and indirectly for the benefit of the people at large. Jewett v. City of New Haven, 38 Conn. 368. Whether an instance of this nature is furnished by the provisions of the defendant's charter respecting the construction and maintenance of sewers, it is unnecessary to inquire. The injury to the plaintiffs was due to no fault of plan or construction, and to no omission to make proper repairs. It was of the same nature as one that might be suffered by the occupant of a new house who strikes his foot, in a dark passage, against an ax, or stumbles over a heap of shavings, which the builder's workmen have carelessly left upon the floor. The failure to sweep out the shavings or pick up the tools is something distinct from the work of building the house. It could only occur after the building was finished. So, even if the charter duty of the defendant as to the construction or alteration of the sewer with which the plaintiffs' store was connected was governmental, its duty, after that had been performed, to clean up and remove any temporary appliances which, if left where they were, would render the sewer unserviceable or inadequate, was a new and ministerial one. It was a simple and definite duty, arising under fixed conditions, and implied by law. State v. S aub, 61 Conn. 553, 568, 23 Atl. Rep. 924. No one else could perform it. The sewer was part of the defendant's property, and under its exclusive control. Its functions in regard to its construction or reconstruction had been discharged; the occasion for an exercise of those as to its repair had not arrived; and, if its agents had before been acting as agents of the law, they now acted, or neglected to act, as its proper servants, subject to the full application of the rule of *respondeat superior*. Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495, 530, 28 Atl. Rep. 32. 'Municipal immunity does not reach beyond governmental duty.' Weed v. Borough of Greenwich, 45 Conn. 170, 183. Had the city authorities expressly directed the workmen employed upon the sewer not to remove the 'centre' or the sand bags, when to allow them to remain was to turn this piece of city property into a nuisance to those who had paid for the right to share in its use, and were dependent upon its efficiency for the enjoyment of the houses and stores which it was built to serve, an action could certainly have been maintained for any resulting injury. Mootry v. Town of Danbury, 45 Conn. 550, 556; Hoyt v. City of Danbury, 69 Conn. 341, 351, 37 Atl. Rep. 1051; Morgan v. City of Danbury, 67 Conn. 484, 496, 35 Atl. Rep. 499. It lies equally in the absence of such directions. The cause of action is the failure to remove the obstructions. Whether this was an intentional or an unintentional omission of duty is immaterial. Nor is it of any consequence that the city, in altering its sewerage system, was relying upon funds derived from bonds issued under an amendment to its charter (Sp. Acts 1893, p. 429), which provided that the sums thus borrowed should be used for such alterations, or for purchase of real estate for parks, 'and for no other purposes whatsoever.' It cannot avoid a judgment for a common-law liability by pleading that it has no money on hand out of which it can be paid. That the storm which was the immediate occasion of the flooding of the plaintiffs' cellar was a severe one can constitute no defense. It was severe, but not extraordinary. Diamond Match Co. v. Town of New Haven, 55 Conn. 510, 526, 13 Atl. Rep. 409."

HUSBAND AND WIFE—CONTRACT TO SUPPORT.—In Scherer v. Scherer, decided by the Appellate Court of Indiana, in November, 1899, 55 N. E. Rep. 494, it was held that a wife cannot recover support provided for in a contract directly with her husband, which recites that they were living apart "by reason of the abandonment one of the other." The court said in part: "The contract in question is in the following language: 'This agreement, made this 1st day of September, 1896, by and between John L. Scherer, of Ohio county, in the State of Indiana, and Anna Scherer, of Dearborn county, in the State of Indiana, witnesseth: That whereas said John L. Scherer and Anna Scherer are husband and wife, but have lived apart since the 30th day of July, 1896, by reason of the abandonment one of the other; and whereas said Anna Scherer is about to commence an action for support against said John L. Scherer: Therefore, for the purpose of providing a support for said Anna Scherer to an extent by compromise agreed on, and for the further purpose of determining the compensation to be paid said Anna Scherer by way of alimony in the event of divorce proceedings, one against the other, it is agreed: (1) That said John L. Scherer shall pay to said Anna Scherer, for her maintenance and support, $10 per month, commencing this day, and payable at the office of Downey & Shutts, in Aurora, Indiana. (2) That if, after the expiration of two years from said 30th day of July, 1896, either party shall prosecute to final judgment an action for divorce against the other, the amount

of alimony to be adjudged in favor of said Anna Scherer shall be $400, on which shall be credited the aggregate amount theretofore paid in such monthly installments. (3) That if said John L. Scherer, after the expiration of said two years, shall successfully prosecute his action for divorce against said Anna Scherer, he shall be further entitled to credit on said judgment for alimony in a sum equal to the necessary costs of said action, not exceeding $15, and not including his attorney's fees.'

"It is not shown by the complaint nor the contract that this separation was occasioned by any reason justified by the law. It is not necessary to cite authorities to the effect that the law favors marriage, and does not sanction contracts intended to effect its dissolution. It appears that the parties were living apart. It appears also that divorce proceedings were in contemplation. The amount of alimony which the wife was willing to accept was agreed upon, from which was to be deducted the amount theretofore paid in monthly installments under the agreement, together with the costs of the suit to a stated amount in the event of a successful prosecution of a suit for divorce. Beach, Mod. Cont. sec. 1256, says: 'If a wife is living apart from her husband, with his consent, or for a justifiable cause, he is liable for necessaries furnished her, whether by an individual on her application or by a city or town, under the laws for the relief of paupers. In an action against a husband for necessaries furnished his wife while she was living apart from him, the burden is on the plaintiff to show that her absence was such as to give her a right to use her husband's credit.' Mayhew v. Thayer, 8 Gray, 172; Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. Rep. 669; City of New Bedford v. Chace, 5 Gray, 28; Inhabitants of Monson v. Williams, 6 Gray, 416; Inhabitants of Brookfield v. Allen, 6 Allen, 585. The contract recites that the parties were living apart 'by reason of the abandonment one of the other.' If this language is construed to mean that the parties had separated by mutual consent—and certainly it will bear no construction more favorable to appellee than that she voluntarily separated from her husband—it fails to show that the wife left her husband for reasons justified by law. In the absence of such showing, she would have no claim against him for support, and any contract to furnish such support would be without consideration. Having separated from him, she can have no claim upon his support unless that separation was justified by some reason recognized by our law. No such reason appears. The dissolution of the marriage contract is not to be left to the caprice of the parties. Our statute provides causes for absolute divorce. It makes no provision for separation *a mensa et thoro*. Had appellee a cause for divorce, she was entitled to a judicial determination of her right and to alimony. It is the policy of the law that those sustaining to one another the relation of husband and wife should live together. Contracts for separation and separate maintenance are approved by English decisions, which have been followed by a number of American cases, but in them provision is made through trustees. We are not advised of any cases in our country where an executory contract entered into by husband and wife without the intervention of a trustee has been enforced by the courts."

LIABILITY OF MUNICIPAL CORPORATIONS FOR TORTS IN THE EXERCISE OR NON-EXERCISE OF PUBLIC OR GOVERNMENTAL FUNCTIONS.

Sec. 1. *General Rule Stated — Conflict Suggested.*—The liability of municipal corporations to actions *ex delicto* is recognized, but in view of the sharp conflict of the decisions, on certain features, this liability cannot always be stated with precision. Notwithstanding certain important principles relating to the subject are well settled, it is clear that the particular circumstances of each case as it arises must largely determine. In the present condition of this special branch of the law it seems the liability or non-liability rests not so much on principle as from the life and development of the law of municipal corporations, which in many respects is more or less complex and abstruse. It may also be noted that municipal corporations are generally created by statute, and "that in every case the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created."[1] Although by some authorities doubted, "there seems to be no time when corporations were wholly free from responsibility for torts by the common law."[2] From a statement of the law made in the latter half of the seventeenth century by Chief Justice Vaughan of the English Court of Common Pleas, it appears that liability was recognized on account of injuries resulting from defective highways, as follows: "If a particular person or body corporate be to repair a certain highway or portion of it, or a bridge, and a man is endamaged, particularly by the foundrousness of the way, or decay of the bridge, he may have his action against the person or body corporate who

[1] Mercey Dock Cases, quoted in a clear opinion in Richmond v. Long, 17 Gratt. (Va.) 375, and approved in 2 Dillon, Munic. Corp. § 948. See Webb's Pollock on Torts, 69-71.

[2] Jones, Neg. of Munic. Corp. § 15.

ought to repair, for his damage, because he can bring his action against them; but where there is no person against whom to bring his action it is as if a man be damaged by one that cannot be known." A recent author points out that in 1774 a municipal corporation was held liable in damages for not keeping a creek in a condition for use; that in 1788 the duty to repair highways was acknowledged; and that in 1798 a Scotch case held the magistrates of the city of Edinburg liable for an injury to one falling into an excavation in a street because of the failure to keep the street in a safe condition for use.[3] The old English statutes of bridges and sewers imposed the duty upon hundreds or parishes to repair and keep in order.[4]

It was also a provision of Magna Charta that no town should be obliged to repair bridges, etc., unless by ancient prescription, and failure was usually punished by indictment.[5] In a leading case the Supreme Judicial Court of Massachusetts (per Gray, C. J.) reviews the authorities and adopts the conclusion that at common law no private action would lie for injury inflicted on account of failure to repair a highway or bridge unless the right to such action was given by statute,[6] but this conclusion is denied.[7] The courts in this country have always recognized the doctrine of corporate liability for torts, and the principle of municipal liability for negligence has been everywhere conceded,[8] which, briefly, is "the absence of care according to the circumstances."[9]

Sec. 2. *Public and Private Character of Municipal Corporations.*—In considering liability for civil wrongs, it should be borne in mind constantly that municipal corporations are of two-fold character; the one public as regards the State at large, in so far as they are its agents in government; the other private in so far as they provide the local necessities and conveniences for their own citizens. A municipal corporation "possesses two kinds of powers: one governmental and public, and to the extent they are held and exercised is clothed with sovereignty; the other private, and to the extent they are held and exercised is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government, and while in the exercise of the latter is a corporate legal individual."[10]

Sec. 3. *No Liability in Discharging Governmental Duties.*—Where the municipal corporation is exercising a power or performing a duty imposed upon it as an agent of the State in the exercise of strictly governmental functions, there is no liability to private action on account of injuries resulting from the wrongful acts or negligence of its officers or agents thereunder.[11] The Supreme Court of Missouri has stated the doctrine as follows: "When the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."[12]

Sec. 4. *Same—Reason for Doctrine.*—In the absence of statute, it has always been the law that no private action for tort will lie against the State, as negligence cannot be imputed to the sovereign.[13] So, in the various localities or local areas where the State

[3] Jones, Neg. of Munic. Corp. § 18.

[4] 4 Reeves' History of the English Law (Finlason's Ed.), p. 471, note a.

[5] 1 Reeves' History of the English Law (Finlason's Ed.), p. 472, note.

[6] Hill v. Boston, 122 Mass. 344.

[7] Jones, Neg. of Munic. Corp. § 45, *et seq.* See comments in 2 Dillon, Munic. Corp. § 965.

[8] Jones, Neg. of Munic. Corp. § 19.

[9] Per Willes, J., in Vaughn v. Taff Vale Ry. Co., 5 H. & N. 679, 688. approved in Jones, Neg. of Munic. Corp. § 1. See N. Y. Cent. R. R. Co. v. Lockwood, 17 Wall. 357; Milwaukee Ry. Co. v. Arms, 91 U. S. 1, *l. c.* 495.

[10] Per Foot, J., in Lloyd v. Mayor, etc. of N. Y., 5 N. Y. 369, 55 Am. Dec. 347: Maximilian v. New York, 62 N. Y. 160, 164, 20 Am. Rep. 468; Edgerly v. Concord, 62 N. H. 8; Springfield, etc. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L. R. A. 660; Caspary v. Portland, 19 Oreg. 496.

[11] Brown v. Guyandotte, 34 Va. 299, 11 L. R. A. 121; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665; Hill v. Boston, 122 Mass. 344, 23 Am. Dec 332. This question is critically considered in Maximilian v. Mayor, 62 N. Y. 160. See Fisher v. Boston, 104 Mass. 87, and Hafford v. New Bedford, 16 Gray, 297. In reference to such matters "they should stand as does sovereignty, whose agents they are, subject to be sued only when the State by statute declares they may be." Per Stayton, J., in Galveston v. Pasnainsky, 62 Tex. 118.

[12] Murtaugh v. St. Louis, 44 Mo. 479; Donahoe v. Kansas City, 136 Mo. 657, 664, *et seq*; Kiley v. Kansas City, 87 Mo. 103; Armstrong v. Brunswick, 79 Mo. 319. 321; McKenna v. St. Louis, 6 Mo. App. 320.

[13] People v. Dennison, 84 N. Y. 272; Langford v. U. S., 101 U. S. 341; Shearman & Redfield on Neg. § 251.

agencies merely perform the governmental functions of the State and acquire no individual corporate existence, they stand as the State, and, therefore, to hold them responsible for negligence would be the same as holding the sovereign power answerable for its action. It is assumed that no private legal duty rests upon a city to perform governmental functions, and, moreover, "their character precludes the idea of the common law rule of responsibility, for there is no standard of reasonable care by which the acts of the government may be tested. The State, through its representatives, namely, the municipal corporation, acts in its sovereign capacity, and does not submit its actions to the judgment of the courts."[14] "The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised in their prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries."[15] But where a State agency becomes a corporation "it thereby acquires an identity distinct from the sovereign power, and the principle stated does not prevent the incorporated body from being held liable for its own negligence."[16] In ascertaining the character of the particular act or omission from which the injury resulted, the inquiry is, was it the exercise of a State or governmental power? Every governmental duty implies the exercise of governmental functions, which the State endeavors to perform for the public good. The exemption from liability is confined to the performance of strictly governmental or political powers and duties. When the corporation acts in its private or municipal character the exemption does not apply.[17]

Sec. 5. *Standpoint from which Responsibility should be Determined.*—In considering municipal liability for tort "it is important to bear in mind," says an intelligent writer, "that the duty to exercise care to be effective must exert its authority over every independent member of society, and in so far as any corporation is freed from responsibility for violating this duty, to that extent individuals lose their natural rights of personal safety. The importance of holding private corporations to the discharge of this duty was quickly recognized, but that it is an equally important matter to save the rights of the individual from violation by public corporations has not been so generally observed. * * * The exemptions from liability in their favor should be kept within the narrowest limits consistent with a free, independent, and effective use of governmental power."[18]

Sec. 6. *Liability of Quasi-Public Corporations.*—A distinction between liability for torts of municipal corporations proper and *quasi*-public or imperfect corporations is often applied. The latter exercise the greater part of their functions as agencies of the State merely, and are created for purposes of public policy, and hence, as a general rule, they are not responsible for the neglect of duties enjoined on them, unless the action is given by statute, as, for example, neglect to repair highways.[19] The immunity from liability of *quasi* public corporations is generally placed upon the ground of their involuntary and public character. They are usually treated as public or State agencies. The obligation to keep in safe condition highways and bridges within their limits is generally regarded as a public, and not a corporate duty.[20] Generally, the rule of non-liability is not applied to the neglect of those obligations, which a county incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is

[14] Jones on Neg. of Munic. Corp. § 27.

[15] Cooley on Torts (2d Ed.), p. 739; Perry v. Worcester, 66 Am. Dec. 431, note.

[16] Jones, Neg. of Munic. Corp. § 23.

[17] It has been suggested that as the people constitute the corporation of the city, they are part of the sovereigns of the State, and hence, it is a departure from principle to hold a governmental agency liable unless it is expressly made liable by statute. Elliott on Roads & Streets, p. 42. But another says, "We can discover no principle and no sufficient authority for the proposition which in effect allows municipal corporations to escape from the necessity of respecting the rights of individuals." Jones on Neg. of Munic. Corp. § 23.

[18] Jones, Neg. of Munic. Corp. § 19.

[19] Swineford v. Franklin County, 6 Mo. App. 39; Reardon v. St. Louis County, 36 Mo. 555; Miller v Iron County, 29 Mo. 122; Ray County v. Bently, 49 Mo. 236; Saline County v. Wilson, 61 Mo. 237; 2 Dillon, Munic. Corp. § 996; 1 Beach, Pub. Corp. §§ 734, 735.

[20] Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Bigelow v. Randolph, 15 Gray (Mass.), 541; Kincaid v. Hardin, 53 Iowa, 430, 36 Am. Rep. 236; Williams v. Taxing District, 16 Lea (Tenn.), 531.

conferred upon it at its request.[21] Thus, where a county made a contract for laying water pipe to the county insane asylum, the work being done under the supervision of the county engineer, and while a trench was being dug in the grounds of the asylum it caved in and killed one of the workmen, it was held that the duty in which the county was engaged was not one imposed by general law upon all counties, but a self-imposed one; that *quoad hoc* the county was a private corporation, engaged in a private enterprise (more especially as the work was being done on its own property), and governed by the same rules as to its liability. The court remarked that it was immaterial whether the performance of the work is voluntarily assumed in the first instance, or is a special duty imposed by the legislature and assented to by the county, and that municipal and *quasi*-public corporations are subject to the same doctrine of liability in this respect.[22] So an unincorporated town was held liable for damages caused by its neglect in the management of its waterworks, in that it allowed a leak of the water which undermined the roadway on which the plaintiff was injured while driving upon it. In this case it appeared that the town derived a revenue from the works, and liability was distinctly placed on the negligent performance of a private duty.[23] Where the management of the property out of which the injury arises is used for profit, the liability of the *quasi*-corporation "undoubtedly rests upon the same liability as persons."[24] But the general tendency of the decisions, it must be confessed, exempts counties from liability for defective roads and bridges, not alone because it is assumed that there is no common law duty requiring them to construct and repair, but even when the law of the State imposed upon them such obligation, and confers the power to assess and collect taxes for this purpose, they are held not subject to private actions for neglect. If the municipal corporation should be held to respond in damages for such neglect, which is the well settled rule, on principle, the county having a similar control over its highways, and the same means to keep them in a safe condition, should in like manner be held. The inconsistency of the cases in this respect is acknowledged.[25] If the true ground of nonliability of *quasi*-corporations for the negligent performance of their duties is to be found in the fact that these duties are usually of a public or governmental character, there is reason for the distinction.[26] However, this is not always the case. On principle, why should not every corporation, public, *quasi*-public or private, be legally liable to a private action to any one who has been damaged by its negligent discharge of any particular duty which is not purely and solely governmental? "The same principle which determines the liability of one public corporation should be called upon to decide whether another similar body is not also liable. In such case the question is, has a corporate body, distinct from the State, failed in the performance of an individual duty? If it has, the rule requiring the exercise of reasonable care has been violated and the foundation is laid for an action of negligence."[27]

Sec. 7. *Governmental—Discretionary and Ministerial Duties.*—A distinction has been drawn between the performance or not of *quasi*-judicial duties which are discretionary, and such as are ministerial which are mandatory.[28] As a general rule, a city is not liable

[21] Bigelow v. Randolph, 15 Gray (Mass.), 541. This distinction is referred to in Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289, and in Kincaid v. Hardin, 53 Iowa, 430, 36 Am. Rep. 236.

[22] Hannon v. St. L uis County, 62 Mo. 313.

[23] Hand v Brookline, 126 Mass. 324. In Michigan it has been held that a fire and water board having no means of raising funds for payment, is not subject to suit for negligence. O'Leary v. Fire & Water Board, 79 Mich. 281. But in that State cities are not usually responsible for neglect of persons in public office, unless made so by statute. Detroit v. Blackseby, 21 Mich. 84, approved in 79 Mich. 285.

[24] Moulton v. Scaborrough, 71 Me. 267, 36 Am. Rep. 308, where a town was held liable for damages arising from the negligence of its officers in permitting a ram kept on its poor farm for the purpose of propagating sheep to run at large. See Rowland v. Kalamazoo, 49 Mich. 553.

[25] If a municipal corporation, one subdivision of the State is liable, "so must be another where the law charges both with a specific duty, and supplies both with the means of performing that duty. The courts which hold that both of such subdivisions are liable are at least consistent, if nothing more." Elliott on Roads & Streets, p. 42. See 2 Dillon, Munic. Corp. (4th Ed.) § 1023b.

[26] See Goodnow. Munic. Home Rule, pp. 162, 163; 2 Dillon, Munic. Corp. § 998. In Haag v. Venderberg County, 16 Ind. 511, 25 Am. Rep. 655, a county was held liable for a nuisance, resulting in injury, caused by a small pox hospital.

[27] Jones, Neg. of Munic. Corp. § 24. Rule applied in House v. Montgomery County, 60 Ind. 580.

[28] 2 Dillon, Munic. Corp. § 1048.

either for the non-exercise of, or for the manner in which in good faith it exercises discretionary powers of a public or legislative character.[29] Thus, it is not liable for failure to enforce State laws or its own ordinances;[30] as, for example, an ordinance forbidding the unlawful use of the streets as by coasting;[31] or prohibiting swine from running at large;[32] or failure to prevent the erection of wooden buildings, within certain limits, in accordance with charter or ordinance provisions;[33] or failure to exercise power to supply water and apparatus for extinguishing fires;[34] or the power to enforce ordinances forbidding the use of fireworks within the corporate limits;[35] or an ordinance directing the city to remove obstructions in a navigable river.[36] So there is no liability for failure of firemen to use proper effort in preventing the spread of fire;[37] or according to some cases, for the negligent construction, maintenance or use of appliances for the extinguishment of fires.[38] Failure to enforce ordinances providing for the abatement of nuisances creates no liability to private action.[39] So a municipal corporation is not liable to private action for injuries resulting from discharge of fireworks within its corporate limits, although done in violation of its ordinances, and under the permission and with the consent of the mayor and other chief officials.[40]

Sec. 8. *Same—Exception to General Rule —Nuisance.*—The rule that a municipal corporation is not liable for the non-exercise of its legislative powers, or for failure to enforce its ordinances, should always be reasonably applied. If the city permits something to exist on its streets and public ways, by license or otherwise, which constitutes a nuisance and which may seriously interfere with a reasonable use of such ways by travelers in the ordinary modes, no sound reason can be advanced to excuse municipal liability in event of damage directly resulting from such nuisance. This would constitute a sound exception to the rule under consideration, which exception is recognized by the decisions. Thus, in a comparatively recent New York case, it was held that a city is liable for injury to property by an explosion of fireworks constituting a dangerous public nuisance, when the display was made under a permit given by the mayor of the city acting under authority of a city ordinance.[41] Prior to this decision the same court held that the granting of a license, even though authorized by ordinance, to an individual, permitting him to keep wagons on the highway, and a person passing under one of them was damaged by its falling upon him because of the collision of the wagon in question with an ice wagon properly passing along the street, would render the city liable. The court found that the wagons in the street constituted a public nuisance maintained by the city, and that the city could not thus make use of its legislative power.[42] Where the municipal authorities suffer streets to become unsafe by reason of failure to enforce police regulations designed to keep them free from obstruction or nui-

[29] Stewart v. Clinton, 79 Mo. *l. c.* 611, 612; Imler v. Springfield, 55 Mo. *l. c.* 125; Schattner v. Kansas City, 48 Mo. 162; Steins v. Franklin County, 48 Mo. 167; St. Louis v. Gurno, 12 Mo. 414; Taylor v. St. Louis, 14 Mo. 20; Woods v. Kansas City, 58 Mo. App. *l. c.* 279; 2 Dillon, Munic. Corp. § 949.

[30] Towler v. Alexandria, 3 Pet. (U. S.), 398; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Wheeler v. Plymouth, 116 Ind. 158; Forsythe v. Atlanta, 45 Ga. 152; Odell v. Schroeder, 58 Ill. 353.

[31] Lafayette v. Timberlake, 88 Ind. 330; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Burford v. Grand Rapids, 53 Mich. 98, 51 Am. Rep. 105.

[32] Levy v. New York, 1 Sandf. 465; Kelly v. Milwaukee, 18 Wis. 83.

[33] Harmon v. St. Louis, 137 Mo. 494; Forsythe v. Atlanta, 45 Ga. 152, 12 Am. Rep. 556.

[34] New York v. Workman, 35 U. S. App. 201, 15 Am. & Eng. Ency. Law, 1147; Jones, Neg. of Munic. Corp. § 31.

[35] McDade v. Chester, 117 Pa. St. 414; Ball v. Woodbine, 61 Iowa, 83, 47 Am. Rep. 805; Morrison v. Lawrence, 98 Mass. 219.

[36] Coonley v. Albany, 57 Hun (N. Y.), 327.

[37] New York v. Workman, 35 U. S. App. 201; Mendel v. Wheeling, 28 W. Va. 223.

[38] Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 760; Springfield F. & M. Ins. Co. v. Keeseville, 148 N. Y. 46, 30 L. R. A. 660; Edgerly v. Concord, 62 N. H. 8; Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90. See 2 Dillon, Munic. Corp. § 976.

[39] Butz v. Cavanaugh, 137 Mo. 503; Armstrong v. Brunswick, 79 Mo. 319, 321; Kiley v. Kansas City, 87 Mo. 103; 1 Dillon, Munic Corp. § 95; 2 Dillon, Munic. Corp. § 951, 15 Am. & Eng. Ency. Law, pp. 1145, 1147; Davis v. Montgomery, 51 Ala. 139.

[40] Bartlett v. Clarksburg (W. Va.), 43 L. R. A. 295; Robinson v. Greenville, 40 Ohio St. 630, 51 Am. Rep. 857; Norristown v. Fitzpatrick, 94 Pa. St 121; Ball v. Woodbine, 61 Iowa, 83, 47 Am. Rep. 805; Hill v. Charlotte, 72 N. Car. 55, 21 Am. Rep. 457; Aron v. Wausau (Wis.), 40 L. R. A. 733. See note to Scanlan v. Wedger, 16 L. R. A. 395; Fifield v. Phœnix (Ariz.), 24 L. R. A. 433; Love v. Raleigh (N. Car.), 28 L. R. A. 192.

[41] Speir v. Brooklyn, 139 N. Y. 6, 21 L. R. A. 641, 36 Am. St. Repts. 664.

[42] Cohen v. New York, 113 N. Y. 532, 10 Am. St. Repts. 506. Approved in Speir v. Brooklyn, *supra.*

sances, and damage results by reason thereof, responsibility cannot be evaded on the ground that the omitted duty is legislative or governmental in character. The cases in the foot note illustrate this principle.[43]

Sec. 9. *Governmental Duties—Penal and Eleemosynary Institutions.*—And it has been held that a municipal corporation is not liable for failure to properly care for those in its hospitals.[44] So there is no liability for the bad condition of a city jail arising from the negligence of the officers in charge where the maintenance of the jail is properly a governmental function;[45] however, in one case, a city was held liable for the unhealthy condition of a jail established and maintained independently by the city.[46] And it has also been held that municipal liability exists for violating duties as to jails imposed by State statute. Where a jail is destroyed by fire caused by the negligence of the officers in charge resulting in the death of inmates, the city is not liable.[47] And the Supreme Court of Missouri has held that St. Louis was not liable in damages to a non-paying patient at the city hospital for injuries resulting from the negligence and misfeasance of the officers and servants of the institution.[48] Where a criminal is injured by reason of defective machinery, it is held that there is no liability.[49] So, in Missouri, where a prisoner is committed to the St. Louis workhouse in satisfaction of a fine imposed for the violation of an ordinance, and who, while at work, is kicked by a vicious mule which the workhouse superintendent ordered him to harness, there can be no recovery of the city for the injuries so received, even though the superintendent knew the mule was vicious.[50]

[43] Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435; Cole v. Newburgpost, 129 Mass. 595, 23 Alb. L. J. 3; Stanley v. Davenport, 54 Iowa, 463; McCoull v. Manchester, 85 Va. 579; Burford v. Grand Rapids, 53 Mich. 98, 51 Am. Rep. 105; Sparr v. St. Louis, 4 Mo. App. 572; 2 Dillon, Munic. Corp. §§ 1010, 1021.

[44] Benton v. Trustees of Boston Hospital, 140 Mass. 13.

[45] La Clef v. Concordia, 41 Kan. 323, 13 Am. St. Repts. 285.

[46] Edwards v. Pocahontas, 47 Fed. Rep. 268, 44 Alb. L. J. 363, decision of U. S. Cir. Ct., W. D. Va.

[47] Moffett v. Asheville, 103 N. Car. 237, 14 Am. St. Repts. 810; Brown v. Guyandotte, 34 W. Va. 299, 11 L. R. A. 121.

[48] Murtaugh v. St. Louis, 44 Mo. 479.

[49] Alamango v. Albany County, 25 Hun (N. Y.), 557; Curran v. Boston, 151 Mass. 505, 8 L. R. A. 243, 30 Am. & Eng. Corp. Cas. 506.

[50] Ulrich v. St. Louis, 112 Mo. 138.

Sec. 10. *Governmental Duties — Police Powers.*—The duty of keeping the peace and the exercise of the police power generally by the municipal corporation is usually considered governmental. With few exceptions, the officers of police represent the State, or the city as the State's agent, in the performance of State functions.[51] Thus, where a policeman, in shooting at a dog running at large contrary to an ordinance, wounds a citizen, the municipal corporation is not liable.[52] As relates to this subject, the police power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers. In the absence of express statute, a city is not liable for damages resulting in the loss of life or property from the acts of a mob or riotous assembly, irrespective of the negligence of its officials.[53] In harmony with the doctrine under consideration, a city is not liable for the death of a child from drowning in a pond situated on private property not in dangerous proximity to the public highway, although the city created the pond. In such case it is held that the city owes no duty to the general public, aside from that of sanitary character.[54]

Sec. 11. *Destruction of Property—Public Necessity.*—There is no municipal liability because of the destruction of property by the corporation, where the public necessity requires it, for the rights of private property are subordinate to the public welfare—*salus populi suprema est lex.* Thus, property may be destroyed to prevent the spread of fire or other great calamity without municipal liability, in the absence of express statute or

[51] Calwell v. Boone, 51 Iowa, 687; Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Harris v. Atlanta, 62 Ga. 290; Kies v. Erie, 135 Pa. St. 144.

[52] Culver v. Streater, 130 Ill. 238, 6 L. R. A. 270.

[53] New Orleans v. Abognoto, 23 U. S. App. 533; Chicago League Ball Club v. Chicago, 77 Ill. App. 124; Hart v. Bridgeport, 13 Blatchf. 289. There are many statutes making cities liable. 1 R. S. Mo. 1889, § 1767; Louisiana v. New Orleans, 109 U. S. 285.

[54] Omaha v. Bowman, 52 Neb. 293, 66 Am. St. Repts. 506; Moran v. Pullman Pal. Car Co., 134 Mo. 641, is a like case. See cases cited there, also note to Barnes v. Shreveport City R. R. Co., 49 Am. St. Repts. 423.

charter provision creating such liability,[55] as where village trustees burned a mill and destroyed a dam to prevent a flood from damaging a highway and other property.[56] Such destruction is not the exercise of the right of eminent domain, entitling the owner to compensation. But "the ground of this exemption from liability is the public necessity, the public good; and, therefore, if the public good did not require the act to be done—if the act was not apparently and reasonably necessary—the actors cannot justify and would be responsible."[57] The fact that the officers of a municipal corporation are authorized by ordinance to direct the destruction of private dwellings and other property to prevent the spread of fire, does not make the corporation liable, on the doctrine of *respondeat superior*, to the owners for the property thus destroyed, unless there is an express statute or provision in the charter creating such liability.[58]

Sec. 12. *Conclusion of General Rule as to Legislative and Ministerial Duties.*—Finally, there is no municipal liability for failure to make public improvements, as to grade streets, construct sewers, drains, etc., improve its harbor, maintain market houses, public bath houses, hospitals and eleemosynary institutions.[59] But where the duty is ministerial and absolute, as distinguished from legislative, discretionary, judicial or *quasi*-judicial, the municipal corporation becomes liable for damages because of omission to perform it.[60]

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[55] 15 Am. & Eng. Encyc. Law, p. 1161; 1 Beach, Pub. Corp. § 748; 3 Harv. Law Rev. 189.

[56] Atken v. Wells River (Vt.), 40 Atl. Rep. 829; Field v. Des Moines, 39 Iowa, 575; American Print Works v. Lawrence, 23 N. J. L. 595; Keller v. Corpus Christi, 50 Tex. 614; Russell v. Mayor, etc., 2 Denio (N. Y.), 461; Stone v. Mayor, etc., 25 Wend. (N. Y.) 157, 173.

[57] 2 Dillon, Munic. Corp. § 955.

[58] Field v. Des Moines, 39 Iowa, 575.

[59] Woods v. Kansas City, 58 Mo. App. 272, 279; Young v. Kansas City, 27 Mo. App. 101; Hinds v. Marshall, 22 Mo. App. 208.

[60] Kiley v. Kansas City, 87 Mo. 103; Russell v. Columbia, 74 Mo. 490. Compare with Blumb v. Kansas City, 84 Mo. 112; Bassett v. St. Joseph, 53 Mo. 290; Halpin v. Kansas City, 76 Mo. 335. Further, as to when powers are imperative or directory, see St. J. & D. C. Ry. Co. v. Buchanan Co., 39 Mo. 485; Leavenworth & Des M. Ry. Co. v. Platte Co., 42 Mo. 171; 1 Dillon, Munic. Corp. §§ 98, 99.

BREACH OF MARRIAGE PROMISE—INCAPACITY—ILLNESS—DEFENSE.

SANDERS v. COLEMAN.

Supreme Court of Appeals of Virginia, December 7, 1899.

When, after defendant had promised to marry plaintiff, but, before the day named for the consummation of the marriage, without his fault, he contracted a urinary disease which kept him constantly under the treatment of physicians, and which would be aggravated by sexual intercourse, and probably shorten his life, such malady was a complete defense to plaintiff's action for breach of promise.

HARRISON, J.: This is an action brought by the plaintiff to recover damages for an alleged breach by the defendant of his promise to marry her on the 27th day of April, 1898.

The declaration states with sufficient clearness and particularity the cause of action, and the demurrer was therefore properly overruled.

It appears that in December, 1897, the defendant, a man 52 years of age, received from the plaintiff, who was then 20 years old, a Christmas card. The defendant had met the plaintiff 3 years before, which was the first and only time he had seen her, though he had in the meantime sent her messages through mutual friends. A correspondence between the parties followed the receipt of the card, which resulted in a visit by the defendant to the plaintiff, in Princess Anne county, where she was teaching school, on the 19th of January, 1898. On this visit the defendant addressed the plaintiff, and in a few days was accepted, and the 27th day of April, 1898, fixed for the marriage.

The defendant filed a special plea in which he admits the engagement, and that the 27th of April, 1898, was agreed upon as the time for its consummation. The plea then denies that the defendant had broken his promise to marry the plaintiff, and avers that after making the promise, and before the time for its fulfillment, the defendant had, by the act of God, and without his own fault, become and was sick of a bodily disease which rendered him unfit to marry on the day agreed upon, and that, on the advice of his physician, he, in good faith, wrote to the plaintiff, and asked for a postponement, to which she agreed; that afterwards, on the 27th day of April, 1898, he being still sick of his disease, and doubtful if he should ever recover from the same, wrote a letter to the plaintiff, informing her of his continued sickness, and of his belief that he would be doing her an injustice to marry her in his condition of health, and requesting the plaintiff for that reason to release him from his engagement.

It appears that about the middle of March, 1898, the defendant became afflicted with some trouble about the urinary organs, causing much uneasiness and suffering, and for which he was being treated by a physician, who, however, knew nothing of defendant's contemplated marriage. On the 4th day of April, 1898, the defendant took

a drive with his friend and neighbor, Dr. Hubbard, into the country. On this occasion he was suffering very much, and described his symptoms fully to Dr. Hubbard, and told him that he expected to be married on the 27th of the month. The doctor told him that he was not in a condition to get married; that he was suffering from one of three diseases, either of which would be aggravated or made worse by marriage; that, if he married in his then condition of health, it might lead to serious results. The defendant then asked what could he do; that the preparations for his marriage were made. The doctor replied: "I will advise you to do what I would do myself under like circumstances: I would ask for a postponement until you can see the result of your symptoms." The doctor urged upon the defendant the importance to himself and the plaintiff of not marrying at the time then agreed upon. In consequence of this advice the defendant on the same day wrote the plaintiff the following letter:

"Whitestone, Va., April 4, 1898. Dear Miss Gertrude: I deeply regret that circumstances over which I have no control will prevent me from keeping my engagement on the 27th of this month. Trusting you will pardon me, I remain, yours, etc., R. M. Sanders."

Upon the receipt of this letter the plaintiff demanded an explanation, in response to which the defendant wrote as follows:

"Miami, Va., April 7, 1898. Dear Miss Gertrude: Your letter received to-day, and I hasten to reply. The only explanation I can give you is this: I am not in a condition at this time to get married, and my physician advised me to put it off a while longer, which I hope will meet with your consent. Hastily, yours, R. M. Sanders."

The plaintiff replied to this letter, consenting to postpone the marriage until the defendant recovered. Subsequently the defendant wrote the following letter:

"Miami, Va., April 27, 1898. Dear Miss Gertrude: I received your letter to-day, and will answer at once. You can't imagine what I have suffered about this affair, and you seem to think some one else has something to do with it, but I can assure you that such is not the case, and that I was honest with you all the time; but I thought two wrongs did not make a right, and that I would be doing you a greater wrong in marrying you, considering my condition, than in not doing it, and for this reason, and this alone, I am going to ask you to release me from the engagement. I could write more, but think this is sufficient. But I will ask, before closing, that you will think kindly of me, as I will always do of you. Hastily, your friend, R. M. Sanders."

To this letter there was no reply, but in a few days thereafter the plaintiff was consulting counsel, and in June following this suit was brought.

In the progress of the trial a number of questions were passed upon, which have been brought before us by bills of exception; but, in the view we take of this case, it is only necessary to consider the assignment of error which relates to the action of the lower court in refusing to set aside the verdict in favor of the plaintiff as contrary to the law and the evidence.

It has been argued with much force that the letters already quoted, which are relied upon by the plaintiff as constituting the breach, are insufficient to show a refusal on the part of the defendant to perform his promise. Without expressing an opinion on that question, but conceding, for the purposes of this case, that the plaintiff had a right to so regard them, we are brought to a consideration of the defendant's plea that after the making of the promise, and before the time for its fulfillment, he had, by the act of God, and without his own fault, become sick of a bodily disease which rendered him unfit to marry on the day agreed upon.

Under the expression "the act of God" are comprehended all misfortunes and accidents arising from inevitable necessity which human prudence could not foresee or prevent. Hence it is held that "illness," being beyond the power of man to control or prevent, is the act of God. Story, Bailm. §§ 25, 511; Fish v. Chapman, 2 Ga. 349; Gleeson v. Railroad Co., 140 U. S. 435, 11 Sup. Ct. Rep. 859, 35 L. Ed. 458.

It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its non-performance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any fault of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condition that both of the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable. Allen v. Baker, 86 N. Car. 91; Shackelford v. Hamilton, 93 Ky. 80, 19 S. W. Rep. 5, 15 L. R. A. 531; Bish. Mar. & Div. § 219.

In the case at bar the evidence (as to which, in our opinion, there is no real conflict) shows that there was a predisposition in the defendant's family to physical trouble of the kind that had developed with him; that his father had died with a similar disease, and a brother with urinary trouble; that after his engagement with the plaintiff, and before the time fixed for the marriage, the defendant had, without fault on his part, developed, and was suffering with, a grave malady, involving the urinary organs, which had continued and kept him constantly under the advice and treatment of a physician up to the time of the trial; that he had cystitis, with probable inflamation of the urethra, complicated with en-

largement of the prostate gland, and that an indulgence in sexual intercourse would aggravate his disease, and likely shorten his life; and that it would be, not only a wrong and injustice to the defendant, but also to the plaintiff, for him to marry in his condition of health. Marriage is assumed in law to be made for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation. On the contrary, an indulgence in sexual intercourse would aggravate his disease, and enhance the chances of a fatal result. As said by a learned judge: "I desire to speak with all reserve; but to possess the lawful means of gratifying a powerful passion, with the alternative of abstaining or periling life, is, indeed, to incur a risk of intense misery, instead of mutual comfort."

Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff.

For these reasons the judgment of the lower court must be reversed, the verdict of the jury set aside, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

NOTE. — *Recent Decisions Involving Incidental Questions as to the Law Governing Breach of Marriage Promise.*—In an action for breach of marriage promise, an instruction that the jury, in determining whether there was a marriage contract, should "take into consideration all the circumstances, as shown by the proof," is not too broad. Smith v. Henry, 46 Ill. App. 42. Where the promise was alleged to have been made in August, and the evidence shows that several promises were made, it is proper to refuse an instruction that the verdict must be for defendant if the contract was not made in August. Nearing v. Van Fleet, 24 N. Y. S. 531, 71 Hun, 137. The fact that plaintiff consented to a two years' postponement of the wedding day does not relieve defendant from his promise. Nearing v. Van Fleet, 24 N. Y. S. 531, 71 Hun, 137. In an action for breach of promise, plaintiff may allege and prove, as an element of damages, seduction under promise of marriage, though a statute gives a woman a right of action for her own seduction. Osmun v. Winters (Oreg.), 35 Pac. Rep. 250. It is for the jury to say whether they will consider the fact of seduction in estimating damages in an action for breach of promise, and it is error to instruct that they must consider it. Osmun v. Winters (Oreg.), 35 Pac. Rep. 250. In an action for breach of promise of marriage, it is immaterial whether defendant was married before the action was brought. McCarville v. Boyle, 89 Wis. 651, 62 N. W. Rep. 517. A contract to marry entered into between parties, one of whom only is qualified to make such a contract, is void. Eve v. Rodgers (Ind. App.), 40 N. E. Rep. 25. A promise of marriage may be inferred from the acts and conduct of the parties towards each other. Button v. Hibbard, 31 N. Y. S. 483, 82 Hun, 289. A petition for breach of promise of marriage is not demurrable because of an allegation therein of defendant's marriage to another woman, inserted merely to show that he had broken his promise to plaintiff. Ortiz v. Navarro (Tex. Civ. App.), 30 S. W. Rep. 581. A petition which alleges that defendant married another woman without plaintiff's consent need not also allege that plaintiff objected to or protested against such marriage. Ortiz v. Navarro (Tex. Civ. App.), 30 S. W. Rep. 581. An allegation in the complaint that "defendant entered into a verbal contract by which the said defendant promised and agreed to marry this plaintiff," is sufficient to show the mutuality of the contract, on motion in arrest of judgment. Edwards v. Edwards (Iowa), 61 N. W. Rep. 413. In an action for the breach of a marriage contract, it is error to charge the jury "that in addition" to the bare pecuniary loss suffered by plaintiff they might consider her loss of time, her expenditures of money growing out of the engagement, her loss of a permanent home, etc.; these matters affording the basis on which the jury should fix the pecuniary loss. Stribley v. Welz, 8 Ohio Cir. Ct. R. 571. Where defendant had considerable property, and plaintiff was engaged in general housework, it was not error to charge that the jury should consider the social standing of defendant and the pecuniary circumstances of plaintiff, and compensate her for the loss of the station and of the home to which defendant invited her. Rutter v. Collins (Mich.), 61 N. W. Rep. 267. It is proper to permit plaintiff to prove, on the question of damages, that defendant was reputed to be the owner of property, and he moved in the best circles of society. Ortiz v. Navarro (Tex. Civ. App.), 30 S. W. Rep. 581. In an action for breach of promise to marry, evidence of defendant's reputation for wealth is admissible to show the condition in life which plaintiff would have secured, had defendant not broken the promise. Stratton v. Dole (Neb.), 63 N. W. Rep. 875. A promise of marriage on consideration of sexual intercourse is void, as *contra bonos mores*. Burke v. Shaver (Va.), 23 S. E. Rep. 749. A positive refusal to perform a contract to marry, even if made before the time for performance, is such a breach of the contract as will authorize an immediate action for damages. Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. Rep. 47. On repudiation by the man *in toto* of the promise of marriage, by which no day was fixed for the marriage, the woman may sue without first having demanded the performance of the contract on a fixed day. Burke v. Shaver, (Va.), 23 S. E. Rep. 749. A complaint alleging mutual promises of marriage by plaintiff and defendant on request, readiness and willingness of plaintiff to fulfill her promise, a request by her on defendant to fulfill his promise, and his refusal, and consequent breach of his promise, states a cause of action for breach of promise of marriage. Getzelson v. Bernstein, 37 N. Y. S. 220, 15 Misc. Rep. 627. It is a good defense that plaintiff was unchaste, and that defendant was ignorant of that fact when he made the promise. Foster v. Hanchett, 68 Vt. 319, 35 Atl. Rep. 316. Allegations of seduction by means of the promise may be pleaded merely in aggravation of damages, and do not cause the complaint to embrace two causes of action. Geiger v. Payne (Iowa), 60 N. W. Rep. 554. In an action for breach of marriage promise, the petition is sufficient when it alleges that plaintiff and defendant had agreed to marry; that plaintiff had incurred expense in preparing for the marriage; that, through the promises of defendant, plaintiff had prepared herself to become for defendant a loving and dutiful wife. Lohner v. Coldwell (Tex. Civ. App.), 39 S. W. Rep. 591. Where the evidence shows that defendant is wealthy, and has a good home, it is not error to instruct that, in estimating plaintiff's damages, the jury may consider the worldly advantage of "a permanent home" and a

"domestic establishment." Geiger v. Payne (Iowa), 69 N. W. Rep. 554. An article published over defendant's signature, attacking plaintiff's character, and an insulting letter addressed by defendant to plaintiff, both written after the commencement of the action, are admissible to prove the animus of defendant in refusing to perform the marriage contract, and may be considered in aggravation of damages. Osmun v. Winters (Oreg.), 46 Pac. Rep. 780. In an action for breach of marriage promise, defendant cannot show, in mitigation of damages, that there was a taint of insanity in plaintiff's family, where defendant knew that fact when he made the promise. Lohner v. Coldwell (Tex. Civ. App.), 39 S. W. Rep. 591. An offer of marriage by one person (there being no legal disabilities existing), constitutes a marriage contract, when acceptance is made known to the other party, and is supported by the consideration of their mutual promises. Walters v. Stockberger (Ind. App.), 50 N. E. Rep. 763. Plaintiff told defendant, to whom she was engaged, that he need not marry her if he did not wish, and later wrote to him, "If you desire a change, take it, and end the matter right here," whereupon the defendant ceased his visits, and, without objection by the plaintiff, courted another, and two years later married her. Held, that the defendant was released from the engagement. Jellett v. Robie (Wis.), 74 N. W. Rep. 781. A mere postponement of a marriage, for reasonable cause, does not amount, in law, to a repudiation or breach of the marriage contract. Walters v. Stockberger (Ind. App.), 50 N. E. Rep. 763. Illicit intercourse between the parties after promise of marriage is no bar to an action for breach of the promise. Fleetford v. Barnett (Colo. App.), 52 Pac. Rep. 293. In an action for breach of marriage promise, by a woman who was married when she first became acquainted with defendant, and procured a divorce so that she might marry defendant, he cannot attack the decree of divorce, and claim that it was void because obtained by fraud and false testimony given by her. Smith v. Hall, 69 Conn. 651, 38 Atl. Rep. 386. To recover for breach of a marriage contract, the plaintiff must, in addition to proof of the contract, show (1) that she was willing to marry defendant; and (2) that he refused to marry her. Walters v. Stockberger (Ind. App.), 50 N. E. Rep. 763. Where a man who has promised to marry a woman a certain day, before that day arrives informs her that he will never marry her, she may bring an action before the day appointed for the fulfillment arrives. Zatlin v. Davenport, 71 Ill. App. 292. In an action for breach of contract of marriage, aggravated by seduction, the burden of proving a release from the engagement is upon defendant. Liese v. Meyer (Mo.), 45 S. W. Rep. 282. Illicit intercourse between the parties before promise of marriage cannot be considered in mitigation of damages in an action for breach of the promise. Fleetford v. Barnett (Colo. App.), 52 Pac. Rep. 293. The fact that defendant attempts to prove plaintiff to be a lewd woman, and fails, may be considered by the jury in aggravation of damages. Fleetford v. Barnett (Colo. App.), 52 Pac. Rep. 293. In an action for breach of promise of marriage, plaintiff may recover compensation for wounded feelings and for pain and mortification occasioned by defendant's conduct. Parker v. Forehand, 99 Ga. 743, 28 S. E. Rep. 400. In assessing compensatory damages, it is proper to consider defendant's financial condition and social position, and what rights and privileges plaintiff would have acquired, pecuniarily and socially, if defendant had performed his contract. Tamke v. Vangsness (Minn.), 75 N. W. Rep. 217. The measure of damages in an action for breach of marriage contract is the injury to the plaintiff's feelings, affected, and wounded pride, as well as the loss of marriage. Liese v. Meyer (Mo.), 45 S. W. Rep. 282. An allegation in defendant's answer, in an action for breach of contract of marriage, and an attempt to prove, that plaintiff's character for chastity and purity was bad, may be considered by the jury in aggravation of plaintiff's damages. Liese v. Meyer (Mo.), 45 S. W. Rep. 282. If a man forms a marriage engagement merely as a cloak to accomplish the woman's seduction, this may be considered in aggravation of damages for the subsequent unjustifiable breach of the contract by him, although the seduction be not accomplished. Kaufman v. Fye (Tenn.), 42 S. W. Rep. 25. Where a man pleads a want of virtue in the woman to justify his breach of a marriage contract, and completely fails to prove the charge, the damages may be aggravated on that account, although the plea was not made in bad faith. Kaufman v. Fye (Tenn.), 42 S. W. Rep. 25. A marriage promise is not without consideration because of a breach of a previous promise. Pyle v. Piercy (Cal.), 55 Pac. Rep. 141. Under Shannon's Code, sec. 4569, providing that no civil action commenced, except for wrongs affecting the character of plaintiff, shall abate by the death of either party, an action for breach of a marriage contract, since it affects plaintiff's character, abates on the death of defendant. Hullett v. Baker (Tenn.), 49 S. W. Rep. 757.

JETSAM AND FLOTSAM.

NON ENFORCEMENT OF THE CRIMINAL LAW.

A curious and evidently erroneous decision arrests the attention of the reader in examining the case of Irvington v. The People, 181 Ill. 408 (1899). It was there solemnly held by the Illinois supreme court that an indictment for an assault with intent to murder, is insufficient, when it fails to charge that the assault was made "feloniously." The ruling is based on common law principles and on the early cases of Curtis v. The People, Breese, 256, and Curtis v. The People, 1 Scam. 285 (1836).

It is not apparent to the ordinary mind why section 411 of the criminal code should not be obeyed by the court. That section reads: "All exceptions which go merely to the form of the indictment shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter, not affecting the real merits of the offense, charged in the indictment. • • • This statute has existed as early as 1845 (and earlier), and was enacted subsequent to the decisions relied upon by the court.

In Curtis v. The People, 1 Scam. 285, the defendant's counsel moved to quash the indictment, which motion was overruled, and the court reversed, following Curtis v. The People, Breese, 256. In the former case, the indictment was for assault with intent to kill and murder, but the defendant was convicted only of the lesser offense—assault and battery—yet the court reversed on account of the lack of form of the indictment, a decision equally erroneous. Again, the criminal code, (Sec. 408) provides that "every indictment shall be deemed sufficiently technical and correct, which states the offense, in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury."

The criminal statute defines an assault as "an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another."

The crime itself involved in the principal case under consideration, is spoken of in the statute as "an assault with an intent to commit murder," making it a felony. It would appear from these sections of the criminal code, that, at most, for the omission of the word "feloniously" an indictment might be quashable before trial, but after trial the judgment should not be arrested for such formality, because the statute so forbids it. It were time that such decisions should pass away, for they hinder the fair administration of justice, and violate the statute of the State—by the court which should enforce it.—*National Corporation Reporter.*

BAILEY ON THE LAW OF JURISDICTION.

Jurisdiction is the starting point in all legal proceedings. If the tribunal before which an action is brought has no proper jurisdiction or power to act upon the questions, that ends the trial, so far as that court is concerned. W. F. Bailey, formerly a circuit judge in Wisconsin, has in the treatise before us very clearly and satisfactorily elucidated the many tangling questions growing out of the jurisdiction of courts. This is not Judge Bailey's first experience in law book making. He has heretofore written upon the subject of master and servant and the law of injuries relating to master and servant. The author has investigated the subject of jurisdiction in a most systematic manner, facilitating the production of this treatise within a small compass consider the magnitude of the subject he has taken those remedies which are framed with special reference to jurisdiction as branches and treated them all in connection as a continuous whole, and how and in what manner juri-dictional defects can be me, as a part of the general subject enabling the preservation of much that is valuable by reason of uninterrupted connection, and has brought the entire subject within the limits of two ordinary law book size volumes, by which the labor of the investigator is much lessened and he is not compelled as heretofore to resort to different works each treating different branches of the subject of jurisdiction, each of which works must necessarily repeat and reiterate much that is contained in other books on various branches of this subject. The subject of contempts, which involves the exercise of special or summary power, is so closely allied to the question of ju.isdiction that it is proper to consider it as a connecting subject, but the author has not confined his discussion of contempts to such as are denominated direct or constructive, but has embraced matters commonly denominated civil contempts. He has also discussed the privileges of witnesses, both constitutional and at common law; also the question of privileged communications, such as between attorney and client, physician and patient, clergyman and layman, husband and wife. The effort which has been made for generations by legal minds to establish rules that shall be practicable and reasonably certain in their application, by which the distinction between want of power and mere error of judgment may be readily determined, has not been entirely successful. There are but few questions upon which the courts are agreed. The author, acting wisely, has not selected and relied upon the opinions of courts which most nearly have met his own views and ignored others, but found it necessary to give the views of different courts involving conflicting opinions, but has carefully and conscientiously discussed the premises assumed by each of the various diverging opinions. In two volumes, containing 1,250 pages, very handsomely bound law sheep. Published by T. H. Flood & Company, Chicago, Ill.

GREENLEAF ON EVIDENCE, VOLS. 2 AND 3, SIXTEENTH EDITION.

In our issue of September 29th, we noticed volume 1 of this work. We have now received volumes 2 and 3. The revision of volume 1 has been entirely done by John H. Wigmore, Professor of the Law of Evidence in the Northwestern University of Chicago, while the revision of volumes 2 and 3 has been done by Edward Avery Harriman, also of the Northwestern University, and professor of law in that university. The second and third volumes treat of the evidence requisite in certain particular actions and issues at common law, and of evidence in criminal cases, also in equity, in admiralty and in court martial. Professor Harriman in volumes 2 and 3 has added much to the notes by the citation of late cases and the addition of new material showing the changes and development of the law. Professor Harriman in his revision of volumes 2 and 3 has worked in accord with Professor Wigmore's revision of volume 1, they both having consolidated their notes with those of Greenleaf and the eminent editors of the fifteen preceding editions which were formerly in two series, thus greatly facilitating the searcher. Notes, comments and citations to explain and re-enforce Greenleaf's statements of law are properly grouped under one reference on each point. In all three volumes the notes of the previous edition are distinguished from those of the present by being inclosed in braces, those of the present edition being inclosed in brackets. Professor Harriman in volumes 2 and 3 has very effectually searched out the new cases bringing the annotations down to the present year, and has pointed out the modifications which have taken place in the law of evidence since the fifteenth edition was published. In the sixteenth edition the statements of the whole law have been placed in the text, doing away with the former overloading of the notes, and all new matter in the text has been carefully distinguished from that of Professor Greenleaf; the notes being now confined to references and citations. Obsolete matter has been dropped from the text and placed in an appendix where it may be found by one desiring to refresh his memory in regard to the past. Statutes and constitutional provisions bearing on the subject of evidence, chiefly on relevancy, are in this edition for the first time printed in full, as digests and extracts from statutes are often misleading. These statutes will be found in the appendix. Very wisely a separate table of cases and topical index are in each volume. The general index which has been very skillfully prepared will be found at the end of the third volume. No other law treatise has ever maintained itself so long and favorably with the legal profession as Greenleaf on Evidence. For over fifty years it has been the leading text book on this subject, during which time it has been cited, recited and quoted in the opinions of the most eminent judges. The type used in these three volumes is considerably smaller than that used in most text books, in consequence of which these three volumes contain as much matter as six volumes of ordinary full size law text books. The publishers found it necessary to so condense in order to cover

this immense subject with three volumes. The printing of the volumes is clear and legible, on the best of paper, and easily read. Published by Little, Brown & Company, Boston.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Administrator—Accounting.—A party who has been appointed as administrator of an estate, and received letters of administration therein, and has seized and misappropriated and dissipated the property of the estate, cannot evade an accounting upon the ground of the nullity of his appointment.—DOBLER v. STROBEL, N. Dak., 81 N. W. Rep. 37.

2. ADMINISTRATION—Claims.—Under Code Civ. Proc. § 1500, providing that the holder of a claim against the estate of a deceased person cannot maintain an action thereon unless the claim is first presented to the executor or administrator, a holder of such a claim can recover only such portion thereof against the estate as has been so presented for allowance and rejected.—BARTHE v. ROGERS, Cal., 59 Pac. Rep. 310.

3. APPEAL—Supersedeas Bond.—When a void money judgment is rendered against a party in a suit, and he executes a *supersedeas* bond, joint and several in terms, along with others, against whom the judgment is valid, it is no defense to him, when sued upon the bond, that the judgment was void, and had been subsequently vacated by the court. The judgment being valid as to some of the parties, and the promise made in the bond to pay it being unconditional, all signers to the instrument are bound.—GILLE v. EMMONS, Kan., 59 Pac. Rep. 338.

4. ASSIGNMENT.—The assignment of a trade-mark by the originator and owner to a corporation organized by him to succeed to the manufacture and sale of the article is valid.—PETROLIA MFG. CO. v. BELL & BOGART SOAP CO., U. S. C. C., S. D. (N. Y.), 97 Fed. Rep. 781.

5. ASSIGNMENT—Delivery Evidence.—A written instrument does not take effect until it is delivered, and to be effectual such delivery must be intentional, made with the purpose that the instrument shall become operative and have the effect to place it beyond the right to be recalled.—ERICKSON v. KELLY, N. Dak., 81 N. W. Rep. 77.

6. ATTACHMENT—Affidavit—Invalidity.—If a writ of attachment be issued upon such a defective affidavit, and the defendant does not appear in the action, the writ and all subsequent proceedings, including the publication of the summons, entry of judgment and issuance of execution and sale thereunder, are null and void, and may be assailed collaterally.—DUXBURY v. DAHLE, Minn., 81 N. W. Rep. 198.

7. BANKRUPTCY—Dissolution of Liens—Limitation of Time.—Bankr. Act 1898, § 67c, providing that an adjudication in bankruptcy shall dissolve "a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun" against the bankrupt within four months prior to the filing of the petition, does not refer, necessarily, to the beginning of the action or suit itself, but to the beginning of that part or branch of the proceedings whose special object is to secure a lien on property of the debtor.—IN RE HIGGINS, U. S. D. C., D. (Ky.), 97 Fed. Rep. 775.

8. BANKRUPTCY—Exempt Proof—Wearing Apparel—Watch.—Where the State statute (Rev. Stat. Wis., § 2982) exempts from execution "all wearing apparel of the debtor," a bankrupt who owns a gold watch and chain, which he habitually carries upon his person in the ordinary mode of use, will be entitled to have the same set apart to him as exempt.—IN RE JONES, U. S. D. C., E. D. (Wis.), 97 Fed. Rep. 773.

9. BANKRUPTCY—Fiduciary Debts—Commission Merchant.—A debt due by a bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, is not a debt created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity," and therefore will be released by his discharge in bankruptcy.—IN RE BASCH, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 761.

10. BANKRUPTCY—Partnership Petition—Amendment.—Where a voluntary petition in bankruptcy by partners prays that "the petitioners" may be adjudged bankrupt, instead of "the said firm," but otherwise follows the official form for a partnership petition, describing the petitioners as the members of the firm, and the schedules show that all their debts are firm debts, and the order of adjudication corresponds with the petition, the defects of form in the petition and adjudication are not material on opposition to the application for discharge, but may be amended *nunc pro tunc*.—IN RE MEYERS, U. S. D. C., S. D. (N. Y.), 97 Fed. Rep. 757.

11. BANKRUPTCY—Priority of Payment—Labor Claims.—Where the laws of the State give a preference to the wages of employees to the extent of $100 to each person, for labor performed within ninety days before the seizure of the employer's property on judicial process, or its sequestration in the hands of a receiver or trustee for the purpose of paying his debts, and the courts of the State hold that this preference or charge outranks any liens on the property created by contract, such a labor claim, to the amount of $100, will be entitled to priority of payment out of the estate of the employer in bankruptcy, in preference to a landlord's statutory lien for rent of the premises in which the bankrupt's business was carried on.—IN RE BYRNE, U. S. D. C., S. D. (Iowa), 97 Fed. Rep. 762.

12. BANKRUPTCY—Proof of Claims—Postponement for Fraud.—Where a national bank bought a judgment of record against one of its debtors, paying much less than its face value, and caused execution to be issued thereon and levied on the debtor's goods, under a secret arrangement between the parties that the execution, after reimbursing the bank for the amount actually advanced, should be managed for the benefit of

the debtor, so as to protect him against his other creditors, and with the result of delaying and defrauding the latter, and within four months thereafter the debtor was adjudged bankrupt, and the bank proved a claim against his estate for the whole amount of the judgment, and had the same allowed. Held, that such allowance should be set aside, and the claim of the bank postponed to the claims of other creditors.—IN RE HEADLEY, U. S. D. C., W. D. (Mo.), 97 Fed. Rep. 765.

13. BANKRUPTCY—Receivership—Property in Foreign Jurisdiction.—Where the court of bankruptcy, upon the filing of a petition in involuntary bankruptcy against an absconding debtor, has appointed a receiver to take charge of his property within its territorial jurisdiction, pending the proceedings on the petition, it will not, before any adjudication has been made, authorize or direct such receiver to bring suit in another State to obtain possession of property of the bankrupt there situate.—IN RE SCHROM, U. S. D. C., N. D. (Iowa), 97 Fed. Rep. 760.

14. BENEFICIAL ASSOCIATIONS—By-Laws—Enactment. —The rights of members in beneficial insurance associations must be made to depend upon the articles of association and the by-laws which have been adopted; and generally speaking, the body which is author zed to make by-laws may change, amend or repeal those already in existence. But changes, amendments and repeals are subject to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and are also subject to the implied condition of being reasonable.—THIBERT V. SUPREME LODGE, K. OF H., Minn., 81 N. W. Rep. 220.

15. BENEFICIAL ASSOCIATIONS — Change of Beneficiary.—An insured in a beneficial association, during the absence of the secretary of the local court, made known to his brother his desire to change the beneficiary, and, at the brother's suggestion, wrote a note, addressed to the secretary, stating such desire, and the name of the proposed beneficiary. Subsequently the secretary, in his presence, changed the name of the beneficiary on the original certificate, and tore up the note, as he considered it merely a memorandum of the change desired. Held, that insured had failed to comply with a rule of the association on a change of a beneficiary, requiring insured to file a "written petition with his court," stating the desired changes.—INDEPENDENT ORDER OF FORESTERS V. KELLHER, Oreg., 59 Pac. Rep. 323.

16. BILLS AND NOTES—Presumption when Sight Draft is Attached.—When a consignor forwards for collection, without other instructions, a sight draft, to which is attached a bill of lading showing a consignment to himself, indorsed by him in blank, the presumption is that the shipper did not intend credit, but that it is a cash transaction, requiring payment by the drawee of the draft before delivery to him of the bill of lading, which presumption is not negatived by the fact that the draft was entitled to three days' grace, and considered in law as a time draft.—W. & A. MCARTHUR CO. V. OLD SECOND NAT. BANK OF BAY CITY, Mich., 81 N. W. Rep. 92.

17. CHATTEL MORTGAGES—Unrecorded Mortgage—Possession.—The possession of a mortgagee, which will validate an unrecorded mortgage, must be actual, open, and public, so that creditors who inquire with reasonable diligence of those in actual possession of the mortgaged property will receive notice of the control and lien of the mortgagee.—STRAHORN HUTTON-EVANS COMMISSION CO. V. QUIGG, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 735.

18. CHATTEL MORTGAGE—Waiver of Lien.—In this case the owner of a chattel mortgage authorized and requested the mortgagor to haul away the wheat covered by the mortgage, and sell the same, and pay him (the mortgagee) with the proceeds. Held, that such consent to a private sale of the property operated as an implied waiver of the lien of the mortgage, whereby the mortgage was defeated.—PETERSON V. ST. ANTHONY & D. ELEVATOR CO., N. Dak., 81 N. W. Rep. 59.

19. CONSTITUTIONAL LAW — Counties — Change of Boundaries.—Const. art. 8, § 28, prohibits the legislature from passing special laws relating to specified subjects, and declares that, where a general law is applicable, no special law shall be enacted. Held, that since it was the function of the legislature to determine whether or not a general law could be made applicable to an unspecified subject, a special act (Laws 1897, ch. 41), providing for a change of the boundaries of S county, was not in violation of the constitutional provision.—STUART V. KIRLEY, S. Dak., 81 N. W. Rep. 147.

20. CONSTITUTIONAL LAW—Eight-Hour Law.—Chapter 114 of the Laws of 1891 (chapter 73, pp. 781, 782, Gen. St. 1897), being an act providing that eight hours shall constitute a day's work for all laborers, workmen, mechanics, and other persons employed by or on behalf of the State of Kansas, or by or on behalf of any county, city, township, or other municipality in the State, etc., is a direction of the State to its agents, and is constitutional and valid.—IN RE DALTON, Kan., 59 Pac. Rep. 336.

21. CONTRACT—Building Contract — Waiver of Defects.—Where a building contract provides that a supervising architect representing the owner shall inspect the material and construction as operations progress, with power to reject any and all material and construction not deemed by him to conform to the contract, a failure to promptly reject any such material or construction for defects discoverable by the exercise of ordinary care, after a fair opportunity for exercising the duties of inspection, constitutes a waiver of such defects.—ASHLAND LIME, SALT & CEMENT CO. V. SHORES, Wis., 81 N. W. Rep. 135.

22. CONTRACT—Indemnity.—Where the buyers of corporate stock, as part of the consideration, agreed to save the seller against "payment" of existing claims or notes against the corporation, for which the seller was liable, the contract is one of indemnity against payment only, and not against liability; and the seller cannot recover a sum which he has not paid, but for which he is liable.—COCHRAN V. SELLING, Oreg., 59 Pac. Rep. 329.

23. CORPORATIONS — Constitutional Law — Special Legislation.—A private corporation is a person within the meaning of the fourteenth amendment of the federal constitution, forbidding a State to deny to any person or class of persons within its jurisdiction the equal protection of its laws.—JOHNSON V. GOODYEAR MIN. CO., Cal., 59 Pac. Rep. 304.

24. CORPORATIONS — Diversion of Funds — Creditors' Rights.—Code 1873, §§ 1071, 1072, which provides that any person who has sustained injury from the diversion of the funds of a corporation to other objects than those mentioned in its articles and published notices may recover damages therefor against the persons diverting such funds, does not apply in favor of one not a creditor of the corporation at the time of the diversion. —BENGE V. EPPARD, Iowa, 81 N. W. Rep. 183.

25. CORPORATION—Extraterritorial Meeting.—A deed made by a corporation pursuant to a resolution of a stockholders' meeting held without the State under the laws of which it was incorporated is void.—HARDING V. AMER. GLUCOSE CO., Ill., 55 N. E. Rep. 577.

26. CORPORATIONS—Powers—Accommodation Paper. —A private corporation, by the consent of all its stockholders and directors, may execute accommodation paper by which it will be bound.—MURPHY V. ARKANSAS & L. LAND & IMPROVEMENT CO., U. S. C. C., W. D. (Ark.), 97 Fed. Rep. 723.

27. CORPORATIONS — Stockholders' Liability.—A suit to enforce a stockholders' liability under Rev. St. § 1769, making them personally liable for wages of employees to the amount of their respective holdings of stock, should be in equity on behalf of one or more plaintiffs and all other creditors having similar claims, against all such stockholders, and also the corporation, unless it has been dissolved or its assets exhausted.—FOSTER V. POSSON, Wis., 81 N. W. Rep. 123.

28. CORPORATIONS — Unpaid Subscriptions — Stockholders.—Where stockholders, knowing a corporation to be insolvent, voluntarily, without consideration and out of the ordinary course of business, transferred their unpaid stock to insolvent or irresponsible transferees, such transfers were void, as against corporate creditors, though one of the stockholders transferred his stock without intent to escape liability thereon.—WELCH v. SARGENT, Cal., 59 Pac. Rep. 319.

27. CRIMINAL EVIDENCE — Evidence of Good Character.—Evidence of the good character of a defendant is to be considered by the jury in all cases, in connection with all the other evidence, in determining his guilt or innocence of the crime with which he is charged, and an instruction that such evidence can only be considered in case the other evidence leaves the question of guilt or innocence in doubt is erroneous.—ROWE v. UNITED STATES, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 779.

30. CRIMINAL LAW — Burglary — Indictment.—An indictment alleging that defendant, with intent to commit an offense, did "break and enter the certain planing mill of one J, in which said mill there was kept for use and deposit by the said J goods, wares, and valuable things," sufficiently shows that defendant broke into a "building," within Code, § 4791, prohibiting one from entering a building with such an intent, in view of section 5289, subd. 5, requiring facts constituting an offense to be stated in ordinary language, so that persons of common understanding may understand them.—STATE v. HANEY, Iowa, 81 N. W. Rep. 151.

31. CRIMINAL LAW—Perjury.—An indictment for perjury, in making a false affidavit, charges that the accused "did wrongfully, unlawfully, knowingly, willfully, falsely, corruptly, and feloniously swear and make oath" before a notary public that the affidavit (subscribed by him, and set out in the indictment) is true. Held, the indictment sufficiently charges that the accused was sworn to the affidavit.—STATE v. SCOTT, Minn., 81 N. W. Rep. 8.

32. CRIMINAL TRIAL—Witnesses of Act.—The general doctrine of the courts now is that, the reason having ceased, the old rule has ceased, that on trials for felony the prosecutor is bound to call and examine all the eyewitnesses of the *res gestæ* or transaction. But, without deciding this question, held that, in this case, the court was justified in refusing to require the State to call certain parties as witnesses, because it did not appear that they were eyewitnesses of the transaction which was the subject of investigation.—STATE v. SMITH, Minn., 81 N. W. Rep. 17.

33. DAMAGES—Sale.—Where fruit trees are bought to be set out on an agreement that they shall be of certain varieties, or others equally desirable, and on commencing to bear they are found to be of an inferior variety, the measure of damages is the value that would have been added to the premises if they had been of the varieties contracted for.—HEILMAN v. PRUYN, Mich., 81 N. W. Rep. 97.

34. DEDICATION—Intention—Reservations.—Where a dedication by a board of county commissioners expressly donates to the public streets, alleys, "market place," and "public ground," as represented on a plat, the fact that a tract designated on the plat as "Public Square" was not mentioned in the donating clause, but was specifically mentioned in another clause as being reserved for the purpose of building a court house thereon, and that the tract designated as "Public Ground" was specifically bounded and described in the acknowledgment, shows that the term "Public Ground" was not intended to include the track designated as "Public Square."—YOUNGERMAN v. BOARD OF SUPRS. OF POLK COUNTY, Iowa, 81 N. W. Rep. 166.

35. DEED - Execution—Evidence.—Where the issue is as to whether a deed contained the name of a grantee when delivered, the testimony of the grantor as to the fact is competent, although at the time of testifying the deed was not presented to the witness for inspection; there being no dispute as to the identity of the deed referred to.—CLARK v. BUTTS, Minn., 81 N. W. Rep. 11.

36. DOWER — Legislative Control.—Before the death of the husband, and while the right of dower is in the inchoate stage, it is subject to legislative control, and may be enlarged, diminished, altered, or abolished.—HATCH v. SMALL, Kan., 59 Pac. Rep. 262.

37. EQUITY - Jurisdiction — Quieting Title.—A plaintiff out of possession of real estate, and holding the legal title thereto, cannot maintain a bill in equity in the courts of the United States against a defendant in possession to cancel a tax deed regular on its face, and which constitutes a cloud upon his title, as the effect would be to draw into a court of equity a controversy properly cognizable at law.—ADOUE v. STRAHAN, U. S. C. C., W. D. (Ark.), 97 Fed. Rep. 691.

38. EVIDENCE—Expert Evidence—Hypothetical Question.—All hypothetical questions put to an expert witness must be based upon facts admitted or established, or which, if controverted, might be legitimately found by the jury from the evidence. They should also embody all the facts relating to the subject upon which the opinion of the witness is asked. A certain hypothetical question held to have been improperly allowed, because not including all the facts bearing upon the subject upon which the opinion of the witness was asked, and also because it was based in part upon a fact not admitted or established, and which there was no evidence tending to prove.—WITTENBERG v. ONSGARD, Minn., 81 N. W. Rep. 14.

39. EVIDENCE—Parol Evidence.—A contract in writing consisting of proposal to put a heating apparatus, guarantied to do certain work, into a dwelling, with acceptance thereof, cannot be varied by parol evidence that the proposal was based on the owner's statement and understanding that he should build a stone wall under the house.—MOUAT v. MONTAGUE, Mich., 81 N. W. Rep. 112.

40. EVIDENCE—Writings.—It was proper to exclude testimony of admissions made by defendant in the pleadings filed in another action, since the record in such action was the best evidence by which to prove its contents.—COLBORN v. FRY, Ind., 55 N. E. Rep. 621.

41. FEDERAL COURTS—Jurisdiction—Adverse Claims to Public Mineral Lands.—Where the allegations of a bill show that the respective parties to the suit are making adverse claims to the same land under the mineral land laws of the United States, and that the proper determination of such conflicting claims necessarily requires the application and construction of those laws, a federal court has jurisdiction of the suit for such purpose, the property in controversy being alleged to be of the requisite statutory value; and having jurisdiction for that purpose, and such suit being equitable in its nature, the court will entertain and determine all incidental questions between the parties growing out of their conflicting claims, and will grant an injunction or appoint a receiver, where such course is proper.—NEVADA SIERRA OIL CO. v. MILLER, U. S. C. C., S. D. (Cal.), 97 Fed. Rep. 681.

42. FEDERAL COURTS—Jurisdiction—Ancillary Suit.—A suit in equity in a circuit court of the United States to restrain the defendant, as receiver of an insolvent national bank, from prosecuting an action at law in the same court against the complainant, is ancillary to the action at law, and the court has jurisdiction without regard to the amount involved.—ALDRICH v. CAMPBELL, U. S. C. C. of App., Ninth Circuit, 97 Fed. Rep. 668.

43. FEDERAL COURTS—Jurisdiction—Federal Question.—A trespass upon a mining claim does not raise a federal question, nor does a claim of right based upon a mere location of a mining claim, as against a patent regularly issued by the land department, under authority of law, for the land covered by such location.—PEABODY GOLD-MIN. CO. v. GOLD HILL MIN. CO., U. S. C. C., N. D. (Cal.), 97 Fed. Rep. 657.

44. FRAUDULENT CONVEYANCES—General Assignment for Creditors.—The burden is on attaching creditors to show that the debtor intended to make a general assignment when a prior mortgage was executed, which they claimed was void because part of a general assignment with preferences, and that the mortgagee had notice thereof.—MILLS v. MILLER, Iowa, 81 N. W. Rep. 169.

45. GIFTS CAUSA MORTIS—Trusts.—Defendant's intestate indorsed certain notes, "In case of my death pay to" the plaintiff. This indorsement was made to reimburse plaintiff for nursing deceased, who, in her last illness, stated to a friend that she wished to have these notes go to plaintiff, and the friend promised to deliver the notes to plaintiff, but did not take possession of them till after decedent's death. Held, not a sufficient delivery of the notes to constitute a gift *causa mortis*.—STOKES v. SPRAGUE, Iowa, 81 N. W. Rep. 195.

46. HIGHWAYS—Commissioners — Powers.—The provision contained in section 44, ch. 42, of the General Statutes of Kansas of 1897, as follows, "Whenever the available means at their disposal will permit," is a condition precedent to, and a limitation upon, the authority of the board of commissioners of highways of a township to enter upon the construction of permanent roads, or to contract an indebtedness against the townships therefor.—WALNUT TP. OF PHILLIPS CO. v. HETH, KAN., 59 Pac. Rep. 289.

47. HUSBAND AND WIFE—Burial of Wife—Liability of Husband.—It is the right and the duty of the husband to bury his deceased wife in a suitable manner. His wishes in the premises must be respected, and no gratuitous intermeddling therewith by third parties will be encouraged. But, if he neglects to discharge the duty of burying his dead wife, he is liable to one who provides for her necessary and reasonable burial. —GLEASON v. WARNER, Minn., 81 N. W. Rep. 206.

48. INHERITANCE TAX.—Where decedent's domicile was within the State, to succession to personal property belonging to him in the hands of his agents in New York, consisting of stocks and bonds of foreign corporations and bonds secured by a mortgage on realty in New Hampshire, passed under the laws of the domicile, and hence the property was subject to the collateral inheritance tax imposed by St 1891, ch. 425, § 1. —FROTHINGHAM v. SHAW, Mass., 55 N. E. Rep. 623.

49. INJUNCTION—Bonds — County Treasurer.—Where a county treasurer was enjoined from collecting taxes, and an injunction bond was filed to indemnify defendant against all costs and damages which might be awarded against the complainant, he was entitled to bring an action in his own name on the bond after the dissolution of the injunction, though his term of office had expired, to recover costs and damages incurred by him in the defense of the action.—BREEZE v. HALEY, Colo., 59 Pac. Rep. 333.

50. INSURANCE — Expiration of Policy — Determination.—In an action on a policy expiring at 12 o'clock at noon of a certain day, the burden was on defendant to show, in avoidance of liability, that, because of a known and established custom obtaining at the place where the insurance was effected, standard railroad time was intended to be used in determining its expiration.—JONES v. GERMAN INS. CO. OF FREEPORT, ILL., Iowa, 81 N. W. Rep. 188.

51. INTOXICATING LIQUORS — Presumption—Justification.—A pharmacist holding a permit to sell intoxicants cannot justify sales to a minor, and to persons in the habit of using intoxicants as a beverage, by a claim that they were in good faith, and without intent to violate the law.—MCCOY v. CLARK, Iowa, 81 N. W. Rep. 159.

52. JUDGMENT—New Trial—Negligence of Attorney.—Where a contestant of a will, who resided at a considerable distance from the county seat, and who was unfamiliar with legal proceedings, employed an attorney to take charge of the matter for him, and paid him a retainer, the failure of the attorney to appear when the case is called for trial, or inform the contestant of the time of trial, is an unavoidable casualty, within Code, § 4091, entitling him to a new trial after the rendition of a judgment by default, as the negligence of his attorney cannot be imputed to him.—PETERSEN v. KOCH, Iowa, 81 N. W. Rep. 160.

53. JUDGMENT—Persons of Unsound Mind.—A person of "unsound mind," within Code 1873, § 3154, empowering the court to vacate a judgment, after the term at which it was rendered, for erroneous proceedings against a person of unsound mind, is one so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs.—GARRETSON v. HUBBARD, Iowa, 81 N. W. Rep. 174.

54. LANDLORD AND TENANT—Negligence—Damages.—That a lessee from month to month continued to occupy the premises for more than 30 days after the landlord's refusal to make promised repairs does not release him from liability for failure to perform the same.—MASON v. HOWES, Mich., 81 N. W. Rep. 111.

55. LIENHOLDERS—Priorities—Vendor's Lien.—As between lienholders having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity. But if one has, on other grounds, a better equity than the other, priority of time is immaterial. *A fortiori*, if one has, in addition, the legal estate, or the right to use the legal title in support of his security, his lien will be given preference, and will not be in any way prejudiced by a lien based wholly on equitable grounds, even though the latter be first in time.—CAMPBELL v. SIDWELL, Ohio, 55 N. E. Rep. 609.

56. LIMITATIONS—Action on Judgment.—Section 5200, Rev. Codes, which limits the time in which actions may be brought upon judgments, applies to judgments that had been rendered prior to the enactment of that section, as well as to judgments subsequently entered; and such statute does not operate upon existing causes of action from the date of the statute only, but, whenever the old statute of limitations had begun to run against a cause of action prior to the enactment of section 5200, the time so run constitutes a part of the limitation period declared by said section.—OSBORNE v. LINDSTROM, N. Dak., 81 N. W. Rep. 72.

57. MALICIOUS PROSECUTION.—A complaint for malicious prosecution is insufficient if it does not show that an alleged discharge and dismissal of the information against plaintiff in the prosecution on which the action was based were such as to finally end the same.—CARPENTER v. NUTTER, Cal., 59 Pac. Rep. 301.

58. MASTER AND SERVANT — Negligence—Assumption of Risk.—Plaintiff was caught between a car, upon the side of which he was riding in the performance of his duty as brakeman, and a fish chute situated so near the track that there was not sufficient room to allow his body to pass between it and the car. Plaintiff was unacquainted with the yards, and did not see the chute, although it appears he could have seen it and his danger, had he looked. Held, that the plaintiff assumed the risk in riding upon the side of the car, and the company was not liable for his injuries.—PHELPS v. CHICAGO & W. M. RY. CO., Mich., 81 N. W. Rep. 101.

59. MASTER AND SERVANT—Negligence—Safe Place.—The rule imposing on the master the duty to furnish a reasonably safe place for his servants to work applies to its full extent to railroad companies; and they have no right to construct their roads and structures after plans of their own, regardless of the safety of their employees, as determined by juries in actions against them for injuries therefrom.—PAHLAN v. DETROIT, ETC. RY. CO., Mich., 81 N. W. Rep. 103.

60. MECHANIC'S LIEN — Amendment of Statute.—Rights under a mechanic's lien law are fixed by the law in force when the contract is made, and the labor or materials furnished, and the lien statement filed; and if subsequently the law is changed the rights thus

acquired cannot be affected, but they will be enforced under the provisions of the law in force when the action to foreclose the lien is brought.—MAHON v. SURERUS, N. Dak., 81 N. W. Rep. 64.

61. MECHANICS' LIENS — Contractors' Indemnity Bond.—Where a building contractor covenanted to keep a building free from liens for a time extending five days beyond the time for making the last payment, neither he nor his sureties could require the last payment, if he was then in default.—HENRY v. HAND, Oreg., 59 Pac. Rep. 330.

62. MORTGAGES — After-Acquired Property.—A mortgage which includes "all the machinery now or hereafter to be placed" on the mortgaged premises, covers machinery subsequently acquired by the mortgagor under a contract held to be one of sale, and not of bailment, and placed on the premises, as against a lease subsequently executed to the seller by the mortgagor, for the purpose of reserving title to such machinery until payment of the price.—KNOWLES LOOM WORKS v. RYLE, U. S. C. C. of App., Third Circuit, 97 Fed. Rep. 730.

63. MORTGAGES — Foreclosure.—Where plaintiff in foreclosure failed to attend the sale, and another bid in the property at a price which the plaintiff's attorney had instructed the sheriff to cry as plaintiff's bid in case he did not attend the sale, the mere fact that the sheriff thought that purchaser was bidding for plaintiff, and that the purchaser when asked by a third person if he was bidding for plaintiff, made no reply, when the price bid was not grossly inadequate, does not justify the setting aside of the sale, on motion of plaintiff, where purchaser did nothing to mislead the sheriff or plaintiff.—FOCKE v. EQUITABLE SECURITIES CO., Kan., 59 Pac. Rep. 285.

64. MORTGAGES—Foreclosure—Limitations.—Where a mortgagee sued to foreclose a mortgage under a stipulation that he might elect to declare the debt due on the mortgagor's failure to pay interest as provided, which suit was subsequently dismissed by consent, and without prejudice, on payment of the interest due, limitations did not begin to run against a subsequent action to foreclose after maturity of the debt from the date of the prior suit, since the mortgagor's election to consider the debt due at that time was waived by his acceptance of the interest and dismissal of the suit.—CALIFORNIA SAV. & LOAN SOC. v. CULVER, Cal., 59 Pac. Rep. 292.

65. MUNICIPAL BONDS — Validity — Recitals.—Where the statute under which municipal bonds are issued does not authorize the board or officers issuing them to determine whether the proposed issue would, in fact, exceed the limit prescribed by law, and there is no recital in the bonds that they do not exceed such limit, and each bond on its face, when taken in connection with the assessment roll, shows the limit to have been exceeded, a general recital that all the requirements of the law have been complied with will not estop the municipality issuing them from showing that the bonds issued exceed the legal limit; and, when that is shown, they are void in the hands of every one. Whether the limit is imposed by the State constitution or by general statute is immaterial.—GEER v. SCHOOL DIST. NO. 11, OURAY CO., COLO., U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 782.

66. NEGLIGENCE—Fires — Instructions.—An instruction that a question as to whether defendant negligently started a fire, and permitted it to spread, "is governed by what would be the ordinary usage and custom that people observe in the use of fire," is erroneous; the proper measure of care being such as the great mass of mankind ordinarily exercise under the same or similar circumstances.—NASS v. SCHULZ, Wis., 81 N. W. Rep. 133.

67. NUISANCE — Continuing Nuisance — Successive Suits.—The test whether an injury to real estate by the wrongful act of another is permanent, in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.—BOWERS v. MISSISSIPPI & R. R. BOOM CO., Minn., 81 N. W. Rep. 208.

68. PARTNERSHIP—Accounting—Party.—Where a firm is composed of an individual and the members of another firm, an administrator of one of the latter is a necessary party to a bill for an accounting.—CARPENTER v. ST. CLAIR CIRCUIT JUDGE, Mich., 81 N. W. Rep. 95.

69. PAYMENT BY MISTAKE—Negligence.—In an action to recover money paid under a mutual mistake of fact, where it appears that the plaintiff prior to and at the time of paying over the money had in his hands the present means of ascertaining whether or not the fact in question existed, but negligently omitted to make the investigation, which, if made, would have discovered the fact in question, and where the further fact appears that on account of such negligence of the plaintiff the defendant lost a valuable right, and that the defendant cannot be placed *in statu quo*, the plaintiff cannot recover.—FEGAN v. GREAT NORTHERN RY. CO., N. Dak., 81 N. W. Rep. 89.

70. PROCESS — Summons — Service.—Testimony of a barrister tending to show a course of practice in the Canadian courts which recognizes the validity of a service of summons by an infant is competent, it not being necessary to show such validity by reported cases.—PATTERSON v. KENNEDY, Mich., 81 N. W. Rep. 91.

71. RAILROAD COMPANY — Accident to Trespasser.—Where a trespasser goes under a train, and upon a brake of a car, in an attempt to steal a ride, no duty of the railroad company arises in his favor until he is discovered by some one in charge of the train; nor can a recovery be had for injuries caused by falling from his perilous position, unless the company was guilty of willful and wanton neglect of duty in not stopping the train and removing him after his peril was discovered.—HANDLEY v. MISSOURI PAC. RY. CO., Kan., 59 Pac. Rep. 271.

72. RAILROAD COMPANY—Freight Rates—Discrimination.—A railroad company whose line extends to a point of intersection with a canal of the State cannot make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers; such contract being prohibited by sections 3866 and 3867 of the Revised Statutes, to prevent discrimination in rates of carriage.—BALTIMORE & O. R. CO. v. DIAMOND COAL CO., Ohio, 55 N. E. Rep. 616.

73. RAILROAD COMPANY—Grade Crossing — Damages.—Where a railroad company, to remove a grade crossing, closes a street on which a lot abutted, at a point not in front thereof, and without interfering with the easement of access immediately in front thereof, the owner cannot maintain a private action for damages, though access to it is rendered more inconvenient,—a more circuitous route being necessitated,—since the injury sustained is one in common with the public.—NEWTON v. NEW YORK, ETC. R. CO., Conn., 44 Atl. Rep. 813.

74. RAILROAD COMPANY—Negligence.—The evidence showed that plaintiff had been in the employ of the defendant as brakeman for some time; that while switching at a station he climbed upon the ladder on the side of a car while in motion, and was struck by a telegraph pole located near the track, and that he was not aware of its dangerous situation. It also appears that he had on previous occasions assisted in switching at such station. Held that, as there were no other like obstructions along the road, from which plaintiff might have been charged with notice of danger, he assumed no risk in climbing upon the ladder on the side of the car.—POTTER v. DETROIT, ETC. RY. CO., Mich., 81 N. W. Rep. 90.

75. RES JUDICATA.—The judgment of a court of competent jurisdiction, so long as the same is unreversed, is conclusive of all questions involved in the issues presented by the pleadings, and passed upon by the judgment of such court, as to parties and privies.—ELLIOTT V. PORTER, Idaho, 59 Pac. Rep. 360.

76. SALE—Execution by Agent.—A contract executed by an authorized agent in his own name, but in fact in behalf of his principal, is the contract of the principal, and suit may be brought against him to enforce its provisions.—EDWARDS V. GILDEMEISTER, Kan., 59 Pac. Rep. 259.

77. SUBROGATION — Mortgage Lien.—Real estate incumbered by mortgage was levied on by a judgment creditor. The land was appraised, advertised, and sold subject to the mortgage, and bid in by the plaintiff in the execution for a nominal sum. Held, that the latter, having bought the equity of redemption only, could not be subrogated to the rights of the mortgagee if the amount of the mortgage debt should be collected from other property of the mortgagor.—KIMBALL V. HUTCHISON, Kan., 59 Pac. Rep. 275.

78. SUNDAY—Church Subscription — Consideration.—A subscription to payment of indebtedness of a church for erection of its church building is within the exception of "charity" to the statute inhibiting labor on Sunday.—FIRST M. E. CHURCH OF FT. MADISON, IOWA, V. DONNELL, Iowa, 81 N. W. Rep. 171.

79. TAXATION — Property of Corporation — Effect of Insolvency.—The insolvency of a private corporation, or the appointment of a receiver therefor at the suit of creditors, does not affect the *status* of his property as to taxation or the lien of a purchaser at a tax sale thereon; and where the taxes were legally assessed and due, and the sale was regular, the corporation or its receiver can only extinguish such lien in the same manner as an individual owner, which, under the statutes of Colorado as construed by its supreme court, is by payment to the holder of the tax certificate of the amount for which the property was sold, together with interest and penalties provided by law. The holder of the certificate is not required to file his claim with the receiver, as a creditor.—RICE V. JEROME, U. S. C. C. of App., Eighth Circuit, 97 Fed. Rep. 719.

80. TAXATION—Sales—Tax Deed.—In the absence of a statute to the contrary, a tax deed regularly issued cuts off delinquent taxes for years previous to that upon which the deed is based.—EMMONS COUNTY V. BENNETT, N. Dak., 81 N. W. Rep. 22.

81. TRIAL—Objections to Evidence.—An objection to the introduction of any evidence in a case, upon the ground that the complaint does not state sufficient facts to constitute a cause of action, is insufficient in not directing the attention of the trial court to the defect in the complaint upon which the party making the objection relies, and the overruling of an objection couched in that form is not, therefore, available error upon appeal.—CHILSON V. BANK OF FAIRMOUNT, N. Dak., 81 N. W. Rep. 33.

82. TRUSTS—Conveyance in Fraud of Creditors.—Where the owner of real estate conveys the same to another party with intent to hinder, delay, or defraud his creditors, and for no consideration except the promise of such party to reconvey to the grantor on request, the transaction creates no trust relation between the parties thereto. Such fraudulent grantee may retain the legal and equitable title to the property as against all the world except the creditors of the grantor.—LOCKREN V. RUSTAN, N. Dak., 81 N. W. Rep. 60.

83. TRUSTS—Following Trust Funds — Identification.—The doctrine that, where property or money has been wrongfully converted, equity will follow it through its transmutations, and impress its product or avails with a trust in favor of the original owner, so long as they can be traced and identified, has its basis in the right of property, and not in any theory of preferring the owner of the property over creditors of the tort-feasor, because of the wrongful conversion. It proceeds upon the theory that the product of the converted property has imparted to it the nature of the original property, and belongs to the same person.—TWOHY MERCANTILE CO. V. MELBYE, Minn., 81 N. W. Rep. 20.

84. TRUSTS—Resulting Trust — Rights and Duties of Trustee.—Under the settled rule in California, established first by decision and later by statute, that where property is conveyed to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom the payment is made, and under the provisions of Civ. Code Cal. §§ 2229, 2230, 2234, defining the rights and duties of trustees, where a bank loaned to a mortgagor a portion of the money required to redeem property from a foreclosure sale, the remainder being furnished by the mortgagor, and the redemption being effected by acquiring the outstanding certificate of sale, and causing the property to be conveyed to a representative of the bank, the bank held the title as a trustee for the mortgagor, to whom it was bound to the exercise of the utmost good faith in dealing with the property, and it could not, without his knowledge, acquire outstanding titles and interests adversely to him and for its own benefit, but such titles and interests will be deemed to have been procured for his protection.—SAV. & LOAN SOC. V. DAVIDSON, U. S. C. C. of App., Ninth Circuit, 97 Fed. Rep. 696.

85. USURY—Recovery of Penalty.—The right given by section 5198, Rev. St. U. S., to recover double the interest paid to a national bank, when the interest so paid is greater than allowed by the laws of the State, is personal to the party paying such usurious interest; and an action to recover the same can be maintained only by such person, or his or her legal representative.—LEALOS V. UNION NAT. BANK OF GRAND FORKS, N. Dak., 81 N. W. Rep. 56.

86. VENDOR AND PURCHASER — Executory Contract—Forfeiture.—A vendor's right to a forfeiture for the purchaser's default in the payment of an installment on an executory contract for a sale of land was waived by his subsequent acceptance of payment, and the execution of a deed.—ZUNKEL V. COLSON, Iowa, 81 N. W. Rep. 175.

87. WAREHOUSEMEN—Storage Receipts—Insurance.—A storage receipt for wheat delivered at a public elevator, after stating the rate of storage, contained the following clause: "This charge for storage shall cover loss by fire only. All other damages, by the elements, or by heating, or riot, or by the act of God, or which in any way have been caused by the holder of this receipt, shall be excepted." Held, this, by implication, constituted a contract of insurance by the warehouseman against loss by fire.—THOMPSON V. THOMPSON, Minn., 81 N. W. Rep. 204.

88. WILLS — Charitable Bequests.—Where a will creating a charitable trust for the purpose of founding a home for aged people designates the location of the home, but is indefinite as to the territory from which its beneficiaries shall be selected, the supreme court will ascertain, as nearly as can be, the intention of the testator as to the method of making such selection.—ALLEN V. STEVENS, N. Y., 55 N. E. Rep. 568.

89. WILLS—Residuary Legatee—Bequests to Charities.—Testator devised the residuum of his estate to the trustees of an orphans' home organized by an unincorporated beneficial association. The purpose of the home was to care for orphan children, of whom it continuously accommodated about 200. The trustees of the home were not incorporated, but formed a continuous board, one-half of whom were elected every two years by the association. Held that, since the home constituted a charity, the gift was not void for want of trustees capable of taking the property, since, if the trustees were not capable of taking, the charity would not fail for that reason.—IN RE UPHAM'S ESTATE, Cal., 59 Pac. Rep. 315.